

This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`



CN
EAM
BA

THE

AMERICAN

AND

ENGLISH

RAILROAD CASES

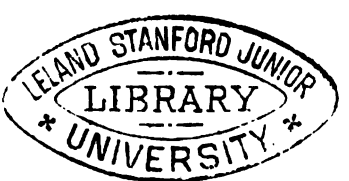
A COLLECTION OF ALL THE

RAILROAD CASES IN THE COURTS OF LAST RESORT IN AMERICA AND ENGLAND.

EDITED BY ADELBERT HAMILTON.

VOL. XXIX.

NORTHPORT, LONG ISLAND, N. Y.
EDWARD THOMPSON, PUBLISHER.



H1358

COPYRIGHT, 1887,
BY EDWARD THOMPSON.

DRUMMOND & NEU,
Printers,
1 to 7 Hague Street,
NEW YORK.

TABLE

OF THE CASES REPORTED.

	PAGE
Atty.-General, Kansas City, etc., R. Co. *v.*	467
Baltimore, etc., R. Co., Chamberlain *v.*	533
Barry *v.* Mo., Kan. & Tex. R. Co.	384
Blanford *v.* Minneapolis, etc., R. Co.	289
Bolinger *v.* St. Paul, etc., R. Co...	406
Burrow *v.* Terre Haute, etc., R. Co.	574
Buttz *v.* North. Pac. R. Co.	455
Central Railroad *v.* English	530
Chamberlain *v.* Baltimore, etc., R. Co.	533
Charleston, etc., R. Co., Crouch *v.*	495
Chicago, etc., R. Co., Drake *v.*	514
Chicago, etc., R. Co. *v.* Glinney..	527
Chicago, etc., R. Co. *v.* Guffey....	200
Chicago, etc., R. Co., McCartney *v.*.	326
Chicago, etc., R. Co., Newaygo Mfg. Co. *v.*	505
Chicago, etc., R. Co., Nichols *v.*..	175
Chicago, etc., R. Co. *v.* Smith....	558
Chicago, etc., R. Co., Voorhees *v.*.	322
Cincinnati, etc., R. Co.. Hill *v.*...	502
Coleman *v.* Flint, etc., R. Co.....	247
Columbus, etc., R. Co., Hooper *v.*	540
Columbus R. M. Co., Minneapolis, etc., R. Co. *v.*	533
Commonwealth, Pennsylvania R. Co. *v.*	145, 154
Corrigan C. S.R. Co., State *ex rel. v.*	591
Cotting *v.* New York, etc., R. Co.	371
Crouch *v.* Charleston, etc., R. Co.	495
Day *et al. v.* Pittsburg, etc., R. Co.	564
Diamond *v.* Northern Pacific R. Co.	117
Donovan *v.* Texas & P. R. Co.....	320
Drake *v.* Chicago, etc., R. Co.....	514
Dubach *v.* Hannibal, etc., R. Co..	609
Duncan, Pennsylvania R. Co. *v.*..	354
East Alabama R. Co. *v.* Tennessee, etc., R. Co	368
English, Central Railroad *v.*	530
Erie, etc., R. Co., Pennsylvania R. Co. *v.*	549
Ex parte Koehler	44
Export Trade of Boston, *In re*....	13
Fidelity, etc., Co., Phila., etc., R. Co. *v.*	404
Flint, etc., R. Co., Coleman *v.*....	247
Fray, Union Pac. R. Co. *v.*	309
Freehold & N. Y. R. Co. *v.* Hodgson	393
Geiger, Savannah, etc., R. Co. *v.*	274
Georgia R. Co., Mayor, etc., *v.*...	477
Glinney, Chicago, etc., R. Co *v.*...	527
Goar, Peoria, etc., R. Co. *v.*	189
Gray *v.* New York, etc., R. Co...	486
Great Western R. Co. *v.* McCarthy	87
Guffey, Chicago, etc., R. Co. *v.*...	200
Hamilton *v.* Vicksburg, etc., R. Co.	490
Hannibal, etc., R. Co , Dubach *v.*..	609
Hannibal, etc., R. Co., State *ex rel. v.*	604
Hayden *v.* Skillings	316
Hastings, etc., R. Co., State *v.*....	440
Hill *v.* Cincinnati, etc., R. Co.....	502
Hitte *v.* Republican Valley R. Co..	586
Hodgson, Freehold, etc., R. Co. *v.*	393
Hooper *v.* Columbus, etc., R. Co..	540
Huntington, etc., R. Co. *v.* Waln..	404
Huntington *v.* Worthen	230
Hunt, St. Johnsbury, etc., R. Co. *v.*	284
In re Export Trade of Boston.....	13
In re Louisville, etc., R. Co.....	16
In re Petition of Southern R. & S. Assoc	5
In re Petition of the Order of Railway Conductors	8
In re Petition of Traders, etc., Union	8
In re Proceedings to Enforce Payment of Taxes	225
International, etc., R. Co. *v.* Klaus	500
Jones *v.* St. Louis, etc., R. Co....	523
Joplin R. Co., Wise *v.*	164
Joyner *v.* South Carolina R. Co...	258
Kalbfleisch *v.* Long Island R. Co..	179
Kansas City, etc., R. Co. *v.* Atty.-General	467
Kansas City, etc., R. Co., Milburn *v.*	244
Klaus, International, etc., R. Co. *v.*	500
Koehler, *Ex parte*	44

PAGE

Lepp *v.* St. Louis, etc., R. Co..... 242
Little Rock & Ft. S. R. Co. *v.* Worthen..... 280
London, etc., R. Co., Wakelin *v.*. 425
Long Island R. Co., Kalbfleisch *v.* 179
Louisville, etc., R. Co. *et al.*, *In re* 16
Louisville, etc., R. Co. *v.* Yniestra 297
Lowney *v.* New Brunswick R. Co. 116
Marquette, etc., R. Co., Redinger *v.* 611
Mayor, etc., *v.* Georgia R. Co.... 477
McCarthy, Great Western R. Co. *v.* 87
McCartney *v.* Chicago, etc., R. Co. 326
McWilliams, Ottumwa, etc., R. Co. *v.*..... 544
Medaris, Texas & Pacific R. Co. *v.* 159
Milburn *v.* Kansas City, etc., R. Co. 244
Miller *v.* St. Louis, etc., R. Co.... 254
Minneapolis, etc., R. Co. *v.* Columbus R. M. Co..... 583
Minnesota Central R. Co., State *v.* 440
Minneapolis, etc., R. Co., Blanford *v.* 289
Mo. Pac. R. Co., Stanley *v.*..... 251
Mo., Kan. & Tex. R. Co., Barry *v.* 384
Munson *v.* Syracuse, etc., R. Co... 377
Newaygo Mfg. Co. *v.* Chicago, etc., R. Co..... 505
New Brunswick R. Co., Lowney *v.* 116
New Brunswick R. Co. *v.* Robinson 132
New York, etc., R. Co., Gray *v.*.. 486
New York, etc., R. Co., People *v.* 480
New York, etc., R. Co., Seeley *v.*. 171
Nichols *v.* Chicago, etc., R. Co.... 175
North. Pac. R. Co., Buttz *v.*..... 455
Northern Pacific R. Co., Diamond *v.*..... 117
Northern Pacific R. Co., State *v.*.. 219
Northern Pacific R. Co. *v.* Territory 82
New York, etc., R. Co., Cotting *v.* 371
Order of Railway Conductors, *In re* Petition of..... 8
Ottumwa, etc., R. Co. *v.* McWilliams..... 544
Pennsylvania R. Co. *v.* Commonwealth..... 145, 154
Pennsylvania R. Co. *v.* Duncan... 354
Pennsylvania R. Co. *v.* Erie, etc., R. Co..... 549
People *v.* New York, etc., R. Co.. 480
Peoria, Decatur & Evansville R. Co. *v.* Goar..... 189
Pfaff *et al.* *v.* Terre Haute, etc., R. Co..... 181
Phila., etc., R. Co. *v.* Fidelity Ins. Co..... 404
Phila., etc., R. Co. *v.* Smith..... 400
Pittsburg, etc., R. Co., Day *et al.* *v.* 564
Pullman Palace Car Co. *v.* State of Texas..... 194
Redinger *v.* Marquette, etc., R. Co. 611
Republican Valley R. Co., Hitte *v.* 586

PAGE

Robinson, New Brunswick R. Co. *v.*..... 132
Salisbury *v.* West. N. Car. R. Co.. 518
Savannah, etc., R. Co. *v.* Geiger.. 274
Seeley *v.* New York, etc., R. Co.. 171
Skillings, Hayden *v.*..... 316
Smith *v.* Chicago, etc., R. Co. *v.*... 558
Smith, Phila., etc., R. Co. *v.*..... 400
Smith *v.* St. Louis, etc., R. Co.... 106
Snyder *v.* Wabash, etc., R. Co.... 237
South Carolina R. Co., Joyner *v.*.. 258
South. Ry. & S. Assoc., *In re* Petition of..... 5
Stanley *v.* Mo. Pac. R. Co..... 250
State *ex rel.* *v.* Corrigan C. S. R. Co..... 591
State *ex rel.* *v.* Hannibal, etc., R. Co..... 604
State *v.* Hastings, etc., R. Co..... 440
State *v.* Minnesota Cent. R. Co.... 440
State *v.* Northern Pacific R. Co... 219
State *ex rel.* *v.* St. Louis Co..... 102
State *ex rel.* *v.* St. Louis, etc., R. Co..... 607
St. Johnsbury, etc., R. Co. *v.* Hunt 284
St. Louis, etc., R. Co., Jones *v.*... 528
St. Louis, etc., R. Co., Lepp *v.*... 242
St. Louis, etc., R. Co., Miller *v.*.. 254
St. Louis R. Co., Smith *v.*..... 106
St. Louis Co., State *ex rel.* *v.*..... 192
St. Louis, etc., R. Co., State *v* ... 607
St. Paul, etc., R. Co., Bolinger *v.*. 408
Syracuse, etc., R. Co., Munson *v.*. 377
Tennessee, etc., R. Co., East Alabama R. Co. *v.*..... 363
Tennessee *v.* Whitworth.....205, 211
Terre Haute, etc., R. Co., Burrow *v.* 574
Terre Haute, etc., R. Co., Pfaff *v.*. 181
Territory, Northern Pacific R. Co. *v* 82
Texas, etc., R. Co., Donovan *v.*... 320
Texas & Pacific R. Co. *v.* Medaris. 159
Texas, State of, Pullman P. C. Co. *v.*..... 194
Traders & Trav. Union, *In re* Petition of..... 8
Union Pacific R. Co. *v.* Fray..... 309
Vicksburg, etc., R. Co., Hamilton *v.* 490
Voorhees *v.* Chicago, etc., R. Co.. 322
Wabash, etc., R. Co., Snyder *v.*... 237
Wakelin *v.* London & South. R. Co..... 425
Waln, Huntington, etc., R. Co. *v.*. 404
Waterloo S. R. Co., Waterloo *v.*.. 601
Waterloo *v.* Waterloo S. R. Co.... 601
Western N. C. R. Co., Salisbury *v.* 518
Whitworth, Tennessee *v.*.....205, 211
Wise *v.* Joplin R. Co..... 164
Worthen, Huntington *v.*..... 280
Worthen, Little Rock, etc., R. Co. *v.* 280
Yniestra, Louisville, etc., R. Co. *v.* 297

THE INTERSTATE COMMERCE COMMISSION.

It is our purpose to print from time to time the most important opinions and proceedings of the Interstate Commerce Commissioners. Ordinarily these records will form an appendix to the volumes of the American and English Railroad Cases. But the rules of the Commission and its recent opinion in the application of the Louisville & Nashville R. Co., for a suspension of section 4 of the Interstate Commerce Act, we believe to be of sufficient importance to have a place at the beginning of this volume, together with several important cases touching railway rates and facilities that have recently been decided in England and in the United States.

INTERSTATE COMMERCE COMMISSIONERS.

Thomas M. Cooley, of Michigan, *Chairman.*
William R. Morrison, of Illinois.
Augustus Schoonmaker, of New York.
Aldace F. Walker, of Vermont.
Walter L. Bragg, of Alabama.
Edward A. Moseley, *Secretary.*

RULES OF THE COMMISSION.

I.

General sessions, when and where held—Special sessions to be regulated by commission.

When at Washington the commission will hold its general sessions at 11 oclock A.M. daily, except Saturdays and Sundays, for the reception and hearing of petitions and complaints, and for the transaction of such other business as may be brought before it. The sessions will be held at the office of the commission in The Sun building, No. 1315 F Street, northwest. When special meetings are held at other places such regulations as may be necessary will be made by the commission. See Commerce Act, sec. 19.

II.

Applications for suspension of fourth section, to be made by petition; by whom made; must state what; how verified—Notice, and proof publication required.

Application under the fourth section of the act for authority to charge less for longer than for shorter distances for the transportation of passengers or property, must be made by petition addressed to the commission by the carrier or carriers desiring the relief. The petition must state with particularity the extent of the relief desired and the points at and between which authority is asked to charge less for longer distances; the reasons for the relief sought must also be set forth and the facts upon which the application is founded. The petition must be verified by some officer or agent of the carrier in whose behalf it is presented, to the effect that the allegations of the petition are true to the knowledge or belief of the affiant. Notice must be published by a petitioner in not less than two newspapers along the line of the road, having general circulation, for at least ten days prior to the presentation of a petition, stating briefly the nature of the relief intended to be applied for and the time when the application will be presented, and proof of such publication must be filed with the petition.

III.

Proceeding on presentation of such application.

Upon the presentation of the petition for relief an investigation will be made by the commission at a time and place to be designated, when testimony will be received for and against the prayer of the petition. After investigation the commission will make such order as may appear to be just and appropriate upon the facts and circumstances of the case.

IV.

Complaints under section 13 made by verified petition—Facts constituting violation to be stated—How verified—Copy to be furnished for each party complained of—Full name of carrier defendant to be stated—Indorsement required—Defendant to be served, and required to satisfy or answer complaint.

Complaints under section 13 of the act of anything done or omitted to be done by any common carrier subject to the provisions of the act in contravention of the provisions thereof, must be made by petition, which must briefly state the facts which are claimed to constitute a violation of the act, and must be verified by the petitioner, or by some officer or agent of the corporation, society, or other body or organization making the complaint, to the effect that the allegations of the petition are true to the knowledge or belief of the affiant. The complainant must furnish as many written or printed copies of the complaint or petition as there may be parties complained against to be served. When a complaint is made the name of the carrier complained against must be set forth in full, and the address of the petitioner and the name and address of his attorney or counsel, if any, must be indorsed upon the complaint. The commission will cause a copy of the complaint to be served upon each common carrier complained against, by mail or personally, in its discretion, with notice to the carrier or carriers to satisfy the complaint or to answer the same in writing within the time specified.

V.

Carrier to answer in 20 days unless shorter time is prescribed—Original answer to be filed at Washington—Copy to be served on complainant personally or by mail—What allegations answer must contain—Verified as provided for complaints—Satisfaction before answer, acknowledgment filed with commission and set up in answer—After may be set up in supplemental answer.

A carrier complained against must answer the complaint made within twenty days from the date of the notice, unless the commission shall in particular cases prescribe a shorter time for the answer to be served, and in such cases the answer must be made within the time prescribed. The original answer must be filed with the commission at its office in Washington, and a copy thereof must at the same time be served upon the complainant by the party answering, personally or by mail. The answer must admit or deny the material allegations of fact contained in the complaint, and may set forth any additional facts claimed to be material to the issue. The answer must be verified in the same manner as the complaint. If the carrier complained against shall make satisfaction before answering, a written acknowledgment of satisfaction must be filed with the commission, and in that case the fact of satisfaction, without other matter, may be set forth in the answer filed and served on the complainant. If satisfaction be made after the filing and service of an answer, a supplemental answer setting forth the fact of satisfaction may be filed and served.

VI.

Carrier complained against may serve notice for hearing as upon demurrer—Answer not admission of sufficiency of complaint—Motion to dismiss for inefficiency may be be made at hearing.

If a carrier complained against shall deem the complaint insufficient to show a breach of legal duty it may, instead of filing an answer, serve on the complainant notice for a hearing of the case on the complaint, and in case of the service of such notice the facts stated in the complaint will be taken as admitted. The filing of answer will not be deemed an admission of the sufficiency of the complaint, but a motion to dismiss for insufficiency may be made at the hearing.

VII.

Continuances.

Adjournments and extensions of time may be granted upon the application of the parties in the discretion of the commission.

VIII.

Issues joined, time for hearing assigned at request of either party—Hearing at Washington unless otherwise ordered—Evidence taken orally before commission unless otherwise ordered—Facts alleged by petitioner and defendant must be severally proven unless admitted by adverse party—Default of answer, commission will in their discretion take proof.

Upon the issue being joined by the service of answer the commission, upon request of either party, will assign a time and place for hearing the same, which will be at its office in Washington unless otherwise ordered. Witnesses will be examined orally before the commission except in cases when special

orders are made for the taking of testimony otherwise. The petitioner or complainant must, in all cases, prove the existence of the facts alleged to constitute a violation of the act, unless the carrier complained of shall admit the same or shall fail to answer the complaint. Facts alleged in the answer must also be proved by the carrier, unless admitted by the petitioner on the hearing. In cases of failure to answer, the commission will take such proof of the charge as may be deemed reasonable and proper, and make such order thereon as the circumstances of the case appear to require.

IX.

Subpœnas for witnesses issue by any commissioner—Whether required to attend and produce books, papers, etc.—On application deposition may be taken of witness unable to attend.

Subpœnas requiring the attendance of witnesses will be issued by any member of the commission in all cases and proceedings before it, and witnesses will be required to obey the subpœnas served upon them requiring their attendance or the production of any books, papers, tariffs, contracts, agreements, or documents relating to any matter under investigation or pending before the commission. Upon application to the commission authority may be given, in the discretion of the commission, to any party to take the deposition of any witnesses who may be shown, for some sufficient reason, to be unable to attend in person.

X.

Amendments of pleadings allowed in discretion of commission.

Upon application by any petitioner or party amendments may be allowed by the commission, in its discretion, to any petition, answer, or other pleading in any proceeding before the commission.

XI.

Copies of pleadings, opinions, etc., furnished on application and payment of expense.

Copies of any petition, complaint, or answer, in any matter or proceeding before the commission, or of any order, decision, or opinion by the commission, will be furnished upon application by any person or carrier desiring the same upon payment of the expense thereof.

XII.

Affidavits, before whom taken.

Affidavits to a petition, complaint, or answer may be taken before any officer of the United States, or of any State or Territory authorized to administer oaths.

In re PETITION OF SOUTHERN RAILWAY AND STEAMSHIP ASSOCIATION.

(*Interstate Commerce Commission Case. April* 6, 1887.)

Section 4 of the "Interstate Commerce Act" prohibiting a greater charge for a short than for a long haul of similar traffic, over a railway, will be suspended, pending investigation and hearing, before the Interstate Commissioners, upon application of railway companies, showing the necessity of charging less for "long" than for "short" hauls in order to meet water competition.

THE facts appear in the opinion.

COOLEY, Chairman.—At a session of the Interstate Commerce Commission, held at the rooms in this city of Washington, on the 6th day of April, 1887, the matter of the petition of the Southern Railway & Steamship Association, application having been made to the Interstate Commerce Commission, under section 4, of the act of Congress entitled, "An act to regulate commerce," by the Southern Railway & Steamship Association, an organization composed of the following railroads, companies, lines and systems and steamship lines operated in connection therewith—to wit: FACTS.

Alabama & Great Southern R., Atlantic & West Point R. Co., Central Railroad of Georgia System, Cincinnati, New Orleans & Texas Pacific R. Co., East Tennessee, Virginia & Georgia R. Co., Georgia R. Co., Georgia Pacific R. Co., Louisville & Nashville R. Co., Nashville, Chattanooga & St. Louis R. Co., Norfolk & Western R. Co., Port Royal & Augusta R. Co., Richmond & Danville R. Co., Rome R. Co., Savannah, Griffin & North Alabama R. Co., Seaboard & Roanoke R. Co., South Carolina R. Co., South & North Alabama R. Line, Western R. of Alabama, Western & Atlantic R. Co., Atlantic Coast Line System, Baltimore, Chesapeake & Richmond Steamboat Co., Boston & Savannah Steamship Co., Clyde's Steam Lines, Merchants & Miners' Transportation Co., New York & Charleston Steamship Co., Oceanic Steamship Co., Old Dominion Steamship Co.,—common carriers subject to the provisions of said act, for authority to charge less for longer than for shorter distances in certain cases—that is to say, for the transportation of property from and to Boston, Providence, New York, Philadelphia, Baltimore, Alexandria, Va.; Cincinnati; Jeffersonville, Ind.; Louisville, Hickman, Ky.; Columbus, Ky.; East Carlo, Ky.; Cairo, Ill.; Henderson, Ky.; Evansville, Ind.; St. Louis, Mo.; and points northerly therefrom to and from Lynchburg, Va.; Danville, Va.; Strasburg, Va.; Norfolk, Va.; Ports-

mouth, Va.; Paint Rock, N. C.; Wilmington, N. C.; Charleston, S. C.; Savannah, Ga.; Brunswick, Ga.; Augusta, Ga.; Columbia, S. C.; Greenwood, S. C.; Laurens, S. C.; Spartanburg, S. C.; Greenville, S. C.; Anderson, S. C.; Macon, Ga.; Milledgeville, Ga.; Athens, Ga.; Gainesville, Ga.; Atlanta, Ga.; Rome, Ga.; Dalton, Ga.; Cedartown, Ga.; Chattanooga, Tenn.; Gadsden, Ala.; Columbus, Ga.; Albany, Ga.; Fort Gaines, Ga.; Eufaula, Ala.; Opelika, Ala.; West Point, Ga.; Montgomery, Ala.; Selma, Ala.; Birmingham, Ala.; Anniston, Ala.; Mobile, Ala.; New Orleans, La.; Pensacola, Fla.; Fernandina, Fla.; Gainesville, Fla.; Baldwin, Fla.; Callahan, Fla.; Meridian, Miss.; Jackson, Miss.; Vicksburg, Miss.; Memphis, Tenn.; Nashville, Tenn.; and points southerly therefrom, and from and to said last named points, each with the other so far as the same are situated in different States, at higher rates than are charged from and to the same points, to and from local points intermediate, the points last enumerated, over the same lines; and certain of said railroad companies, lines and systems, having also severally made application for like authority so far as said points are reached by them respectively; and said common carriers having presented as a reason for granting their said application, the existence of water and other competition, claiming that the same cannot be met except by maintaining the rates heretofore established to and from the said points, which are alleged to be too low to enable said common carriers to carry on business if applied to said local intermediate points; and further claiming that great disturbance of business will occur if present traffic arrangements and rates are immediately changed; and it appearing to the commission after investigation of the said petition and the facts presented in support thereof, to be a proper case for a temporary order authorizing existing rates to be maintained for the time being, until the commission can make a complete examination of the matters alleged in said petition as reasons for relieving said common carriers from the operation of said section of said act:

It is ordered, That the said application be and the same hereby is granted temporarily, subject to modification or revocation by the commission at any time, upon hearing or otherwise, and the said common carriers are hereby temporarily relieved from the operation of the fourth section of said act to the extent specified in the recitals of this order and for a period not greater than ninety days from this date; subject, however, to the restriction that none of the said common carriers, while this order remains in force, shall in any case charge or receive compensation for the transportation of property between stations on their respective lines where more is charged for a shorter than for a longer haul, which shall be greater than the rates in force and charged and received by said carriers respectively on the 31st day of March, 1887, schedules of

ORDER.

which have been filed with the commission. It is made a further condition of this order that a printed copy hereof shall be forthwith publicly posted and kept with the schedule of rates, fares and charges at every station upon the lines of said common carriers, where such schedules are by law required to be posted and kept for the use of the public.

And it is further ordered that the commission convene at Atlanta, Ga., on the 26th day of April, 1887, at 3 o'clock P.M., and thereafter at Mobile, Ala., April 29; New Orleans, May 2, and at Memphis, Tenn., on May 4, for the consideration of the subject-matter of said petition, at which places and times said common carriers or any of them may appear and present application for said relief with evidence in support thereof; which application in each case must show the precise relief desired, the facts upon which the same is claimed, and the extent to which relief from the operation of said section of said act is asked for. And at the same places and times, any persons interested in opposing any such application may also appear and be heard, and at any time prior to May 6, 1887, the commission will receive printed or written communications in support of or in opposition to the relief asked for by said petitions. This announcement respecting times and places of hearing and methods of procedure is subject to change or enlargement in the discretion of the commission.

General Request to Suspend Section 4.—A general request by letter of the president of a railway company that the commission construe section 4 of the Interstate Commerce Act on the point whether "long haul" rates may be reduced below "short haul" rates in order to meet competition is not sufficient to authorize the commissioners to make a decision. Applications to the commission for special exception under the Interstate Commerce Law can only be granted after investigation into the facts, upon a verified petition, setting forth the grounds of the application being filed. *In re* Southern Pacific R. Co. April 5, 7, 1887.

No Opinion in Advance as to Rates.—The Commission will not undertake to say in advance what rates railroad companies shall or shall not make for any class or organization of persons. *In re* Theatrical Rates. April 14, 1887.

In re PETITION OF THE ORDER OF RAILWAY CONDUCTORS.

In re PETITION OF THE TRADERS AND TRAVELLERS' UNION.

(*Interstate Commerce Commission Case. April* 16, 1887.)

The Interstate Commerce Commission has no power to construe the Interstate Commerce Act in advance of the proper presentation to it of specific complaints that the law has been violated.

PETITIONS.

WALKER, Ch.—An application in writing has been made to the commission for its answer to the following questions, propounded on behalf of the Order of Railway Conductors:

QUESTIONS STATED.

1. Are railway companies prohibited from issuing free transportation to the immediate families of employees of their own railways?

2. Are railway companies prohibited from issuing free or reduced transportation to officers of associations composed exclusively of railway employees while those officers are temporarily out of railway service and exclusively employed by those associations?

3. May railway companies issue passes to employees of other railways on the application of the employee, or must such application come from the officer of the company by which he is employed?

4. May railway companies issue free or reduced transportation to those who make railway service their business or trade while temporarily out of employment and in search of situations.

5. May railway companies provide free transportation for delegates to the annual conventions of an association composed exclusively of railway employees, upon certificates from the officers of the association that they are such representatives.

6. If free transportation may be furnished to representatives described in question 5, must all such representatives be actually in the employ of some railway, or may it include those who may be temporarily out of employment, and those temporarily engaged in other employments as officers of such association?

7. If free transportation is provided for delegates described in question 5, may it include members of the immediate families of delegates?

8. If free transportation or reduced rates are provided for the representatives of any one association, must the same be

extended to all others which are composed exclusively of railway employees, on application.

Another application has been made to the commission on behalf of the Traders and Travellers' Union, stating the system under which an additional allowance of free baggage has been heretofore carried by commercial travellers, subject to written agreement for registry and indemnification; which system the commission is requested to examine carefully, "and advise us if there is any reason why a railroad company, desiring to do so, should not enter into such an arrangement to grant, under stated terms, an increased allowance of free baggage."

These two petitions, psesented by highly respectable organizations and raising questions of immediate practical importance, are representatives of a large number of similar applications which have been made to the commission for its construction of provisions of the "Act to regulate commerce," as applied to the various points at which those provisions touch the customs of the past. They have been selected simply because they indicate the general character of all, and enable the commission to announce certain conclusions to which it has arrived respecting its jurisdiction and its powers.

It is obvious from the tenor of such applications as these, which reach us by every mail, that the impression is generally prevalent that this commission has power to construe, interpret, and apply the law, by preliminary judgment. We are continually appealed to for decisions in advance as to whether common carriers, said to be willing to adopt certain measures of dealing with respect to interstate commerce, can do so without subjecting themselves to the penalties denounced by the statute for violation of its provisions. JURISDICTION OF COMMISSIONERS.

A careful reading of the "Act to regulate commerce," under which this commission is organized, will show to the petitioners and others who have made similar applications that no jurisdiction has been given us to answer questions like those under consideration. An expression of our opinion upon these subjects at this time, being neither a duty imposed nor a power conferred by the statute, would carry with it no judicial efficacy or sanction; in fact it would be no more useful to the public or the carriers than the opinion of other men upon the same points.

Two sections of the law confer power upon the commission to entertain and decide applications and petitions.

Section 4 empowers us, upon application by a common carrier, to authorize such common carrier in special cases to charge less for longer than for shorter distances over the same line, and also to prescribe the extent of the relief from the operation of the former part of the same section which a designated common carrier may from time to time enjoy. A number of petitions have been

filed under this section, the consideration of which is at the present time engaging the attention of the commission; and nothing said in this opinion is to be treated as in any manner bearing thereon. It is obvious that applications like those of the Railway Conductors and the Traders and Travellers' Union have no relation whatever to the duties imposed upon us by section 4. And this is the only section of the law which the commission has power to suspend or relax.

Section 13 authorizes complaints to the commission, and confers jurisdiction to entertain the same. It provides that any person, etc., "complaining of anything done or omitted to be done by any common carrier subject to the provisions of this act *in contravention of the provisions thereof*, may apply to said commission by petition, which shall briefly state the facts."

Notice and opportunity for answer having been given, unless satisfaction is made, an investigation is required. Upon such an investigation the commission will necessarily entertain the consideration of the question whether the conduct complained of is or is not in contravention of the provisions of the law; and if it so adjudges, it is authorized to issue a notice enjoining the carrier from further violation of the law, and to award reparation for the injury done, or both.

But neither the Railway Conductors nor the Traders and Travellers' Union claim that any common carrier has violated the law. On the contrary, they both aver that the railroad companies do not now violate the law, and do not wish to do so. The conductors say that they fear they will not receive free passes as heretofore; and the traders and travellers say that they fear commercial travellers will not be allowed free transportation for 150 pounds of extra baggage, as was allowed last year. They present no complaint of anything done or omitted in contravention of the provisions of the law.

SPECIFIC COMPLAINT IS ESSENTIAL.

If a railroad company should issue a pass to a conductor and his family to attend the approaching convention, or should transport 300 pounds of baggage free for a commercial traveller under the registry and indemnity system, and some person, feeling aggrieved, should make complaint of unjust discrimination, it would then be proper for the commission to entertain the question of whether such conduct was or was not in violation of the law, and if so, whether it was or was not within the exceptions stated within section 22. Complaints may also be presented if the charges made by the carriers are not considered reasonable and just. But until questions of this kind come before us in the way clearly indicated by the statute, it would be worse than useless for us to express opinions or give advice.

We should not only lay ourselves justly open to the charge of assuming unwarranted authority, but should also run great risk of

involving all concerned in what the courts might afterwards hold to be breaches of the law by hasty and ill-considered conclusions, based upon *ex parte* statements and arguments. Although it might be desirable, or at least convenient, in respect to any piece of new legislation, to have a tribunal established to which inquirers might apply for instruction and advice respecting the meaning of the law and its application to suggested "circumstances and conditions," a moment's reflection will show that no such tribunal could be properly erected. Congress has not taken the management of the railroads out of the hands of the railroad companies. It has simply established certain general principles under which interstate commerce must be conducted.

It has enacted in section 1 that all charges for interstate transportation shall be reasonable and just; has prohibited in section 2 all manner of unjust discriminations; has forbidden in section 3 all undue and unreasonable preferences; has required in the same section reasonable and equal facilities for the interchange of traffic, and has prohibited in section 5 the pooling of freights. That, in substance, is the Interstate Commerce Law. There is nothing novel in these provisions. They simply bring back the business of the common carriers to the well-settled principles of the common law. Yet no one can deny that there was urgent need of their statutory formulation. Alleged difficulties of putting them in operation only disclose examples of the extent to which they have been violated in the past.

These sections of the act are expressed in plain words. A construction must be given to them in the first instance by the carriers and their patrons. When a course of conduct has been adopted of which complaint is made that it violates the law, the decision of the question will rest with the courts or with the commission, as the complaining party may elect. This is the orderly method in which all legislation is administered and applied; and the statute in question presents no exception.

PENALTIES CONSIDERED.

One more suggestion may properly be added. It appears from the numerous petitions that have been laid before us for preliminary advice, many of them obviously upon the suggestion, if not by the procurement, of the carriers themselves, that common comment on the law by the carriers and those who have heretofore enjoyed special favors at their hands describe the system of penalties which the law provides as extreme, and the risks imposed upon unintentional and unwitting violators of its provisions as enormous.

Such comment seems to us neither fair nor just. It is true that section 8 provides that for violation of the law, and for failure to do an act which the law requires, the offending common carrier shall be liable to the injured party for the actual damages sustained, together with a reasonable counsel or attorney's fee, to be

fixed by the court, and collected with the costs in the case. It is also true that section 10 imposes a fine of "not to exceed $5000" upon common carriers and their officers, agents or servants who wilfully do or cause to be done, or willingly suffer or permit to be done, any prohibited act, etc., upon conviction in a district court of the United States. The civil remedy described in section 8 adds an attorney's fee to the existing common-law right of an injured party to recover the full amount of his damages, a condition of affairs which cannot greatly alarm corporations disposed to fair dealing; while the criminal remedy given in section 10 obviously pertains to intentional violations of the law, and is in these cases to be graduated by the court according to the enormity of the offence.

Good faith, exhibited in an honest effort to carry out the requirements of the law, will involve reasonable and fair-minded officials in no danger of damages or fines. The elasticity of the statute in their favor is noticeable. The unjust discrimination of section 2 must be "in a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions." The preference or advantage of section 3 must be "undue or unreasonable." Throughout the act, as it now stands, in confessedly experimental form, there is exhibited an obvious and a generous purpose to allow to the corporations ample scope in the conduct of their business as common carriers for the people, and fair consideration of every reasonable claim, while insisting upon just, impartial, open, and consistent rates of charge to which every citizen shall be subject alike whose situation is the same. Surely the people could not ask for less.

The language and the tenor of the act wholly fail to justify railroad managers, if any such there be, who refuse to accept responsibilities, decline to offer rates, neglect to announce conditions of traffic, embarrass the customary interchange of business, and impose stagnation upon trade, while they "stick in the bark" of the phrases and expressions of the law, inventing doubts and imagining dangers. It is still more unjustifiable for railroad companies to make use of the general clauses of the law, ignoring its modifying and enlarging words and formulas, in order to impose additional burdens upon localities, trades, professions, manufacturers, consumers, classes of travellers or employees, straining and repressing every construction in favor of the corporate treasury, and quoting the new law as their authority for all manner of petty exactions. The powers of the commission are entirely adequate to cope with such conduct, the existence of which is not affirmed, although it has been somewhat publicly suggested. The same statute which enacts that charges for like service shall be uniform to all also provides that charges in every case, and for every kind and class of service, shall be reasonable and just.

As the law is practically applied it is seen to contain many elements of advantage to the economical and profitable management of the business of the carriers, which they have not been slow to apprehend and take the benefit of. The commission ventures to express the hope that with this explanation respecting the mutual functions of the carriers and the commissioners in carrying the law into effect according to its true intent and meaning, there will be no lack of good faith and active co-operation in continuing the normal activity of every kind of reputable industry and traffic throughout the land, under favorable, fair, and reasonable terms, conceding frankly to the people all the rights, benefits, advantages, and equal privileges which the "Act to regulate commerce" was intended to secure.

In re Export Trade of Boston.

(*Interstate Commerce Commission Case. April* 23, 1887.)

Petitions to the commission will be dismissed where they ask the commission to authorize rebates alleged to be lawful and proper.

Petitions by the Fitchburg R. Co., and other railroad companies.

Cooley, Chairman.—Several petitions regarding this trade are before us: One from the Fitchburg R. Co., and others from the Boston & Lowell, the New York & New England, Facts. the Central Vermont Line, and the Boston & Albany R. companies. All seek the same relief, and upon a state of facts which may be summarized as follows:—

For many years it has been the practice of the railroad companies connecting Boston with western points to make the rates from such points to Boston upon grain and provisions for export as low as the rates to New York, although the rates upon property for local consumption have during the same time been higher to Boston than to New York, the distance being somewhat greater. The rates to the seaboard and abroad, it was shown, are in effect determined by the shortest line from the interior, which for this purpose is the Pennsylvania line; the other lines conforming substantially to those rates as a security to participation in the traffic.

The equalization of rates upon the export business has sometimes been made by waybilling to Boston at New York rates, but as this is not always practicable it has more commonly been made by paying a rebate equal to the difference between Boston and New York rates.

Making the allowance in some form has been essential to the existence of the trade, since the ocean rates from Boston to New York are not materially different, and higher interior rates would exclude Boston altogether from participation in the foreign trade.

The practice which allows the rebate has, therefore, been adopted in a spirit of fairness to Boston and as a convenient method for equalizing the rates from western points to the foreign market, whether the route chosen by the shipper for his traffic be by way of Boston or of New York.

The petition of the Fitchburg R. Co. states that "the New England railroads have been advised by the unanimous opinion of the counsel consulted by them that this practice was not illegal under the Interstate Commerce Bill, inasmuch as the terms are available for all engaged in the like and contemporaneous transportation of such traffic under similar circumstances and conditions, and being equal to those by New York are neither unjust nor unreasonable. This commercial usage has in fact been looked upon as a vested right of this port (Boston) and upon the faith of its continuance vast sums have been expended to accommodate and permanently continue the export business. Unfortunately, however, adverse legal opinions have apparently been rendered by the advisers of the trunk lines, whose actions, guided thereby, has practically stopped the practice and has seriously embarrassed the Boston export business, and threatens to put a stop to it, to the great detriment of this road and the business interests of Boston."

The prayer of the the petition is that the commission "authorize the trunk lines to bill export freight to Boston at New York rates, or take such other action as may seem best in order that this business may be continued upon as fair and favorable a basis as it has been done hitherto."

The other petitions are not essentially different. A hearing was had upon all together and evidence was taken in support of their allegations of fact. A party interested in the local grain and provision trade of Boston was also heard in favor of the contention that any concessions made in favor of the export trade of Boston ought in fairness to be extended to all other persons to whom grain and provisions may be consigned at that city from interior markets.

It was shown on the hearing that the Boston export trade was for the time being under considerable embarrassment arising from a doubt whether the railroad companies might lawfully continue the rebate which has been heretofore allowed. It was not so evident, however, that the commission had the power to give relief. Indeed, the petitioners when called upon to point out the provision of the Interstate Commerce Law under which the commission had authority to grant the relief prayed, frankly confessed that there was difficulty in doing so. It was stated, however, that there were

times when the rebate exceeded the ocean rates, and that then a suspension of the operation of the fourth section of the act would be necessary, since otherwise the railroad companies would be liable to penalties for charging and receiving a greater sum for the transportation of grain and provisions from western points to Boston than from the same western points through Boston to the foreign market. But a case of this sort, it was conceded, would be quite exceptional, so that a suspension of the long and short haul clause of section 4 would not alone give the relief required.

What the companies desire is authority to continue payment of the rebate as well when it falls short of the ocean rates as when it exceeds it.

If what is paid under the name of a rebate were a rebate in fact, as understood in the second section of the Interstate Commerce Law, and if the effect of allowing it were to impose upon some classes of persons a greater charge for service rendered than was imposed upon others for a like contemporaneous service, under the same circumstances and conditions, and so effect what is described in the law as an unjust discrimination, it would neither be legal in itself nor could it be made legal by any order, assent, or permission made or given by the commission. But as explained by the petitions and the evidence adduced in their support, the rebate has for its purpose to correct an inequality that would otherwise exist, and which, by making the cost of foreign shipments by way of Boston greater than by way of New York, would practically exclude shippers from the choice of the Boston route, though the distance from interior points to the foreign market would be practically no greater by that route than by the other. This alleged necessity for the equalization of rates on export traffic is relied upon as the justification for the higher rate which is imposed on the traffic whose final destination is Boston, which higher rate, however, is averred to be in itself just and reasonable. If such is the real nature of the so-called rebate—if its purpose is only to do indirectly what might directly be done by bill of lading issued at the interior point of shipment for the delivery of the goods at the foreign destination, and if no discrimination is made between persons engaged in the foreign traffic, but the rebate is paid impartially and only as a means of protecting the Boston route for the export trade against an excess in charge that would be ruinous to it, then it is obvious there is no occasion for calling upon the commission to give sanction to a practice which would be legal without it. Indeed any legal ground for affirmative action on the part of the Commission is precluded when those who bring the practice to its attention do so with explanations of its propriety and insisting upon its lawfulness. REBATES.

Whether all freights from interior points to Boston ought to be carried at rates as low as those prevailing from the same points to

New York, is a question not legitimately before the commission now.

The railroad companies, who are the only parties asking action at our hands, justify the differences now made on the ground of longer haul, while submitting to the rebate on the export trade, under a species of compulsion. If the exactions from the Boston traffic proper are exclusive, the fact can only be adjudicated when somebody questions them in a proceeding instituted for the purpose of regular investigation.

It follows from what has been said that no order should be made on the petitions, and the petitioners have leave to withdraw them.

MORRISON, Commissioner, concurs in the determination to make no order in the premises, and that leave be given to withdraw the petitions.

In re THE LOUISVILLE AND NASHVILLE R. CO. *et al.*

(*Interstate Commerce Commission Case. June* 15, 1887.)

The prohibition in the fourth section of the Interstate Commerce Act against a greater charge for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance, as qualified therein, is limited to cases in which the circumstances and conditions are substantially similar.

The phrase "under substantially similar circumstances and conditions" in the fourth section, is used in the same sense as in the second section; and under the qualified form of the prohibition in the fourth section, carriers are required to judge in the first instance with regard to the similarity or dissimilarity of the circumstances and conditions that forbid or permit a greater charge for a shorter distance.

The judgments of carriers in respect to the circumstances and conditions is not final, but is subject to the authority of the commission and of the courts, to decide whether error has been committed, or whether the statute has been violated. And in case of complaint for violating the fourth section of the act, the burden of proof is on the carrier to justify any departure from the general rule prescribed by the statute by showing that the circumstances and conditions are substantially dissimilar.

The provisions of section one, requiring charges to be reasonable and just, and of section two, forbidding unjust discrimination, apply when exceptional charges are made under section four as they do in other cases.

The existence of actual competition which is of controlling force, in respect to traffic important in amount, may make out the dissimilar circumstances and conditions entitling the carrier to charge less for the longer than for the shorter haul over the same line in the same direction, the shorter being included in the longer, in the following cases:—

1. When the competition is with carriers by water, which are not subject to the provisions of the statute.

2. When the competition is with foreign or other railroads, which are not subject to the provisions of the statute.

3. In rare and peculiar cases of competition between railroads which are subject to the statute, when application of the general rule of the statute would be destructive of legitimate competition.

The commission further decides that when a greater charge in the aggregate is made for the transportation of passengers or the like kind of property for a shorter than for a longer distance over the same line in the same direction, the shorter being included in the longer distance, it is not sufficient justification therefor that the traffic which is subjected to such greater charge is way or local traffic, and that which is given the more favorable rates is not.

Nor is it sufficient justification for such greater charge that the short-haul traffic is more expensive to the carrier, unless when the circumstances are such as to make it exceptionally expensive, or the long-haul traffic exceptionally inexpensive, the difference being extraordinary and susceptible of definite proof.

Nor that the lesser charge on the longer haul has for its motive the encouragement of manufacturers or some other branch of industry.

Nor that it is designed to build up business or trade centres.

Nor that the lesser charge on the longer haul is merely a continuation of the favorable rates under which trade centres or industrial establishments have been built up.

The fact that long-haul traffic will only bear certain rates is no reason for carrying it for less than cost at the expense of other traffic.

COOLEY, Ch.—The Louisville & Nashville R. Co. was one of the first to apply for relief under the fourth section of the "Act to regulate commerce," which, after declaring the general rule that more shall not be charged or received in the aggregate by a common carrier subject to the law, for the transportation FACTS. of passengers or of the like kind of property, under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, the shorter being included in the longer, proceeds then to authorize exceptions, and confers upon the commission certain powers in respect thereto.

From the first there have been two opinions regarding the proper construction of this provision for exceptions; one view being that no exception can be lawful unless made with the sanction of the commission; and the other, apparently better supported on the words of the statute, that an order of relief is not required when the circumstances and conditions are substantially dissimilar, since the carrier, in acting upon them, would commit no breach of law, though it would be responsible in case it were found that the circumstances and conditions were misconceived or misjudged. Under this last view the order for relief would be needful only when the case was not one of plainly dissimilar circumstances and conditions, but in which, nevertheless, there might be reasons and equities that would sanction such greater charge.

The commission is informed that the interstate roads north of the Potomac and the Ohio and east of the Missouri, with substantial

unanimity, have conformed to the requirements of the fourth section by putting in force tariffs rearranged accordingly. Some friction was manifested for a time, arising largely from the discontinuance of special rates, favors, and privileges, and from the adoption of new classifications; but where the fourth section has been thus made operative, very few instances have come to our attention of injury thereby occasioned.

The roads which anticipated especial injury to commerce from the strict enforcement of the law were principally those situated in the Southern States and the transcontinental lines. After a little time some of the north and south roads in the territory first mentioned found themselves excluded to a certain extent from business which they had previously handled, but these instances were not numerous, so faras the commission is at present advised.

In the cases where loss of revenue to the roads and injury to the business of the country was most seriously anticipated, the railroad companies, although some of them took the ground that the statute contemplated they would determine for themselves the exceptional cases in which they might make a lower charge for a longer haul, nevertheless were unwilling to incur the peril of so arranging their tariffs that they would in any instance conflict with the general rule which the act prescribed, apparently deeming it more prudent to suffer temporary loss of traffic until the act could receive authoritative construction than to subject themselves to heavy penalties in case it should finally be held that the general rule must be applied in every case until the authority of the commission for making exceptions had been given. The Louisville & Nashville Co. was one of those which took this position, and upon its application a temporary order of relief was made. Following the making of that and of other like orders, the commission proceeded to take a great amount of testimony bearing upon the question whether the several carriers relieved were warranted in making rates on their lines which were not in conformity to the statutory rule, and in doing so it invited light from all sources, and was glad to have the assistance, not only of the railroad companies, but of competing steamboat owners, of boards of trade, and of citizens generally, whatever might be their line of business. The fullest opportunity has been afforded to any citizen of the United States who desired to be heard upon the matter, to present facts personally or by affidavit, and arguments *viva voce*, in writing, or in print. The invitation has been quite largely accepted; the subject has been laid fully before us, and we have endeavored to give to it the consideration its importance demands.

In making the orders of temporary relief, no opinion was expressed upon the question whether they were necessary for the protection of the carriers in case the circumstances and conditions were found to be in fact dissimilar. The railroad companies did

not raise that question, but, as has been said, elected as a matter of prudence to apply for the preliminary order. No objection could well be taken to this course provided it should prove to be practicable for the commission to take up and in a reasonable time dispose of the several applications made to it; but it was almost immediately perceived that the number was to be so great that this would be quite out of the question. Each order for relief would necessarily be preceded by investigation into the facts, on evidence which in most cases would be best obtained along the line of the road itself. A single case might therefore require for its proper determination the taking of evidence all the way from the Pacific to the Atlantic, and this not merely the evidence of witnesses for the petitioning carrier, but of such other parties as might conceive that their interests or the interests of the public would be subserved either by granting the relief applied for or by denying it.

If the commission were to give to the petitions the time needed for their proper determination, it would be compelled to forego the performance of judicial and other functions which by the statute were apparently assumed to be of high importance, and even then its authority to grant relief would be performed under such circumstances of embarrassment and delay that it must in large measure fail to accomplish the beneficial purposes which we must suppose the statute had in view. Assuming—as we must when the law provides for it—that it is important to the public interest that a privilege to charge more for the shorter haul than for the longer over the same line in the same direction, should be admitted in some cases, as had been the custom, the interruption of the privilege when the case was proper for it would presumptively cause mischief, and should not therefore be compulsory while the slow processes of an investigation were going on, especially as the particular investigation might itself be compelled to await the determination of many others. Moreover, an adjudication upon a petition for relief would in many cases be far from concluding the labors of the commission in respect to the equities involved, for questions of rates assume new forms, and may require to be met differently from day to day; and in those sections of the country in which the reasons or supposed reasons for exceptional rates are most prevalent, the commission would, in effect, be required to act as rate-makers for all the roads, and compelled to adjust the tariffs so as to meet the exigencies of business, while at the same time endeavoring to protect relative rights and equities of rival carriers and rival localities. This in any considerable state would be an enormous task. In a country so large as ours, and with so vast a mileage of roads, it would be superhuman. A construction of the statute which should require its performance would render the due administration of the law altogether imprac-

ticable, and that fact tends strongly to show that such a construction could not have been intended.

We have listened, with an earnest desire to reach a just conclusion, to all the arguments presented on the construction of the statute, by those appearing either to advocate or to oppose the applications, and after mature consideration we are satisfied that the statute does not require that the commission shall prescribe in every instance the exceptional case, and grant its order for relief before the carrier is at liberty in its tariffs to depart from the general rule. The terms of the statute clearly lead to the opposite conclusion. It declares:—

"It shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of the like kind of property under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, the shorter being included in the longer distance."

Here we have clearly stated what is unlawful and forbidden; and for doing the unlawful and forbidden act penalties are then provided. But that which the act does not declare unlawful must remain lawful if it was so before, and that which it fails to forbid the carrier is left at liberty to do without permission of any one. The charging or receiving the greater compensation for the shorter than for the longer haul is seen to be forbidden only when both are under substantially similar circumstances and conditions; and therefore if in any case the carrier, without first obtaining an order of relief, shall depart from the general rule, its doing so will not alone convict it of illegality, since if the circumstances and conditions of the two hauls are dissimilar the statute is not violated. Should an interested party dispute that the action of the carrier was warranted, an issue would be presented for adjudication, and the risks of that adjudication the carrier would necessarily assume. The later clause in the same section, which empowers the commission to make orders for relief in its discretion, does not in doing so restrict it to a finding of circumstances and conditions strictly dissimilar, but seems intended to give a discretionary authority for cases that could not well be indicated in advance by general designation, while the cases which upon their facts should be acted upon as clearly exceptional would be left for adjudication when the action of the carrier was challenged. The statute becomes on this construction practical, and this section may be enforced without serious embarrassment.

CONSTRUCTION OF STATUTE.

From the recital of the history of the framing of this section (which is given further on), it appears among other things that the proviso respecting orders for relief was devised by the Senate committee which originally drafted the section, and that it was an

essential part of it as first proposed; the prohibitory part of the section being then quite stringent, but a discretion being conferred upon the commission to relieve against its operation. Afterwards the words "under substantially similar circumstances and conditions" were inserted in the first sentence of the section. The proviso was perfectly intelligible so long as the leading clause contained a hard and fast rule against charging more for the shorter than for the longer haul. It was then obvious that a discretion was left to the commission in the matter of relaxing the rule when different circumstances and conditions rendered such relaxation in its judgment proper. Had the section passed as it then stood, the exercise of such a discretion might have been entered upon by the commission with a distinct understanding of the task imposed, even though its adequate performance might have been out of the question; but modified as it now stands, the necessity for a relieving order is greatly narrowed, it being obvious that no order is needed to relieve against the operation of the statute when nothing is done or proposed which it makes unlawful.

If any serious doubt of the proper construction of the clause of the statute now under review should, after careful consideration of its terms, still remain, it would seem that it must be removed when section 2, in which the same controlling words are made use of, is examined in connection. That section provides:—

"That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

Here it will be observed that the phrase is precisely the same; and there can be no doubt that the words were carefully chosen, probably because they were believed to express more accurately and precisely than would any others the exact thought which was in the legislative mind. And in this section, as well as in section 4, the phrase is employed to mark the limit of the carrier's privilege; its privilege, too, in respect to the very subject-matter with which section 4, where it is employed, has to do, namely, the charges for transportation service. It is not at all likely that Congress would deliberately, in the same act and when dealing with the same general subject, make use of a phrase which was not only carefully chosen and peculiar, but also controlling, in such different senses

that its effect as used in one place upon the conduct of the parties who were to be regulated and controlled by it would be essentially different from what it was as used in another. But beyond question the carrier must judge for itself what are the "substantially similar circumstances and conditions" which preclude the special rate, rebate, or drawback which is made unlawful by the second section, since no tribunal is empowered to judge for it until after the carrier has acted, and then only for the purpose of determining whether its action constitutes a violation of law. The carrier judges on peril of the consequences; but the special rate, rebate, or drawback which it grants is not illegal when it turns out that the circumstances and conditions were not such as to forbid it; and as Congress clearly intended this, it must also when using the same words in the fourth section have intended that the carrier whose privilege was in the same way limited by them should in the same way act upon its judgment of the limiting circumstances and conditions.

Most of the applications made to the commission for relief may be said to be based upon a showing of dissimilar circumstances and conditions claimed to justify the larger charge for the shorter haul. The commission was asked to find that such dissimilar circumstances and conditions existed, and the question was presented in a great variety of forms. Upon this question it was believed that investigation into the conditions of railroad service in the States south of the Ohio and east of the Mississippi would be particularly useful. In the system of rate-making practiced in that section, the making of a greater charge on interstate business to and from intermediate stations than to and from competitive points requiring a longer haul had been, it appears, substantially universal, and business men in the larger towns united with the carriers in asserting that the cessation of the practice would force a stoppage of trade to an extent that would be destructive of many considerable interests. That section, therefore, seemed to afford a proper field for an inquiry into the reasons supposed to justify the practice. When the investigation was concluded the reasons which had been advanced appeared to be substantially the following:—

That the support and maintenance of a railroad ought properly to be borne by the local traffic for which it is supposed to be built, and the through traffic may justly be carried for any sum not below the actual cost of its own transportation.

That the cost of local traffic is greatest, and the charges for carrying it should be in proportion, and if they are so they will often result in the greater charge for the shorter haul.

That traffic carried long distances will much of it become impossible if charged rates corresponding to those which may properly be imposed on local traffic; and it must therefore be taken in

recognition of the principle, accepted the world over, that traffic must be charged only what it will bear.

That the long hauls at low rates tend to build up manufactures and other industries without injury to the traffic upon which the rates are heaviest.

That charges on long hauls, which are less than the charges on shorter hauls over the same line in the same direction, are commonly charges which the carriers do not voluntarily fix, but which are forced upon them by a competition from whose compulsion there is practically no escape.

On some one or more of these reasons each of the applications was planted.

On the construction which we give to the statute these several applications need not have been filed, and therefore they might now be withdrawn without further judgment. But though the carrier might have acted on the judgment of its managers, it would have been at the peril of the consequences, and as it elected not to assume the responsibility, but to apply to the commission for a relieving order, it may be proper to consider the application on its merits, especially as the question, What is a case of dissimilar circumstances and conditions within the meaning of the law? must in general be a mixed question of law and fact, upon which differences of opinion would be expected to arise. It is manifestly important to the public interest, as well as to that of the railroads themselves, that mistakes shall as far as possible be avoided. It is also important that the general rule laid down by the statute be strictly complied with whenever compliance appears to be fairly practicable, and that carriers direct their attention more to the feasibility of coming into conformity with it, than to the possibility of finding reasons upon which to ground exceptions. They are therefore entitled to the benefit of such conclusions as we have already reached upon the general merits of their applications, that they may be guided thereby in the preparation of their tariffs respectively. In giving these conclusions we limit ourselves strictly to the cases presented, and leave out of view such other grounds of relief, if any, as are not yet formally brought forward.

I. The fact that the shorter haul is of local traffic and the longer is not we cannot accept as making out a case of dissimilar circumstances and conditions within the meaning of the statute.

DISTINCTION BETWEEN LOCAL AND THROUGH TRAFFIC.

The claim to that effect which was advanced in support of one of the applications rests upon a theory that railroads are constructed for the special accommodation of the traffic along their lines respectively, and that consequently that traffic may be relied upon for their support, and may fairly be charged with all the items of cost and maintenance. Traffic originating at a distance and taken over the line may on this theory be justly transported at any rates the carrier may consent to accept

not below the actual cost of movement, and the local shippers are not in position to complain that such rates, as compared with what they must pay, seem to discriminate unjustly. But this theory has very little foundation in fact. It is not true, as a general rule, that railroads are constructed in exclusive reliance upon local traffic; on the contrary, through traffic is also contemplated, and is sometimes expected to yield returns even greater than that which the local traffic is likely to give. And whenever a road is constructed with special regard to local traffic, it is very likely to be the case that the local communities take upon themselves especial burdens in aid of the construction. When they do so they may justly claim that their traffic should be favored if discrimination of any sort is to be admitted. There are cases also in which roads have been constructed with special regard to long-haul traffic, some of them with the aid of government grants, and in such cases the theory lacks all plausibility. Indeed, it may be said to become plausible in any case only when, after a road has been constructed, some new and unanticipated business is offered it for long haul, but at rates relatively lower than the local traffic is charged. It may be neither unreasonable nor unjust to accept the lower rates for the long-haul traffic in some cases on grounds stated further on; but it will not be because of any such inherent difference between long and short haul traffic as can make the latter chargeable with heavier burdens.

II. That the cost to the carrier of handling and transporting local traffic is greater than that of traffic carried long distances is a fact which may with greater reason, when the difference is considerable and clearly shown, be claimed to make out a case of dissimilar circumstances and conditions under the statute. Cost of the service is always an important element in the fixing of rates; and the evidence taken by the commission tends to show—what indeed is well known and understood—that in proportion to amount and to the distance it is transported, the cost of the local traffic to the carrier is considerably the greater. This fact fairly establishes in favor of the carrier an equity entitling it to make for the more onerous service a greater proportionate charge. But it does not follow that the difference may be so great as to make the case an exception to the general rule the statute has prescribed. It is obvious that the statute intends that the greater charge for the shorter haul shall only be made in cases which on their facts are exceptional; and when the carrier shows the general fact that the local traffic is most expensive he thereby proves not the exception, but the rule. To establish the exception it would be necessary to go further and make proof that in the case of the particular traffic the difference in cost would be exceptionally great. Such cases sometimes arise. They occur on water as well as on land, and vessel-owners on the rivers make the greater charge for the shorter haul in the same

COST AS AN ELEMENT IN RATE MAKING.

direction in many cases, defending their doing so with good reason on this very ground of greater cost, in making landings, etc. The carriers by land may sometimes justify the like charges with equal reason.

There is in the case, however, an inherent difficulty of no small moment. While cost, as has been said, is an element to be taken into account in the fixing of rates, and one of the very highest importance, it cannot for reasons well understood, be made the sole basis, but it must in any case be used with caution and reserve. This is not merely because the word "cost" is made use of in different senses when applied to railroad traffic, it being often used to cover merely the expense of loading, moving, and unloading trains, but also because, in whatever sense the word may be used, it is quite impossible to apportion with accuracy the cost of service among the items of traffic. First of all, when it is undertaken there must be an apportionment between the passenger traffic and the freight traffic; and if we suppose this to be made with reasonable accuracy there must then be a like apportionment between the different kinds and classes of freight. Freight comes to a road in infinite variety, some heavy, some light, some in large packages, some in small; some perishable or of special value and requiring peculiar accommodations and care; it is picked up in varying quantities at numerous stations, to be carried differing distances, sometimes on fast trains and sometimes on slow; the service is performed by men whose compensation differs, but the most of whom have something to do with all branches of the traffic, so that all assist in carrying it on over a road and by means of buildings, appliances, and equipment which have been provided for the whole. Any attempt to apportion the cost, therefore, would at the best and under the most favorable circumstances only reach an approximation. This is so well understood the world over, that the propositions which from time to time have been made in other countries to measure the charges of the carrier by the cost of the carriage solely have always been abandoned after investigation.

We may well believe, therefore, that the statute, in its provision against the greater charge for the shorter haul, did not intend that a difference in cost which is practically universal, and could not possibly be arrived at with accuracy, should as a general fact be a governing consideration, to the extent that would support the greater charge for the shorter haul in the cases in which such greater charge was in general prohibited. Where there are no circumstances to make the short haul exceptionally expensive to the carrier, or the long haul relatively inexpensive, a difference in rates which reason and fairness will justify may still be made within the limitation of the statute; but to make out the exceptional case, in which the general rule of the statute may be disregarded on the ground that the circumstances and conditions are not substantially

similar, the difference in cost should itself be exceptional, and be capable of proof amounting to practical demonstration.

In support of one of the applications presented to us the carrier was able to make a showing of lower cost on long-haul freight more clear and distinct than is commonly possible. The showing was that the through business on its 450 miles of road was transacted by different trains from the local; that these moved much more rapidly and carried vastly the most freight to the train; that the number of men required was much less in proportion, not only upon the trains, but for the station and terminal service, and consequently all the items of expense were much smaller. These facts, which were apparent to the customers of the road, together with the peculiarly effective water competition, which affected principally the through traffic, influenced intelligent men doing business at local stations to admit, in giving evidence, that it might be just, and even necessary in some cases, that the charge for the shorter haul should be the greater. The disproportion, it was insisted, had been too great; but when the question is one of degree, regulation rather than prohibition must be admitted to be the appropriate remedy; and the carrier must keep in mind that if the right be established in any case to make the greater charge for the shorter haul, it is not a right to make a charge not just or reasonable in itself, or one which will work unjust preference between individuals, localities, or commodities. It is, on the other hand, a right grounded in justice, and must be so exercised that the result shall be equitable.

III. We have next the case of dissimilar circumstances and conditions supposed to be made out by a showing that property now transported long distances at very low rates could not be transported at all unless concession in rates were made to it. This is a common fact in railroad transportation; the cases are to be met with in the traffic of all the long lines. The necessity for making concessions to long-haul traffic in the case of articles whose value in proportion to bulk or weight is small, and especially in that of the necessaries of life, which are handled in large quantities, and in the supply of which the most distant countries compete, has long been conceded wherever railroads exist. The household goods of immigrants to the West have been carried for them at very low rates, and the results of their agriculture have afterwards been taken for seaboard and European markets in recognition of the general principle that the traffic must not be charged rates beyond what it can bear. This is a just and sound principle when justly applied; and the country may be said not only to have acquiesced in its recognition, but to have desired and urged its application in a great variety of cases. Any suggestion that it was meant by the statute to abrogate it would scarcely be plausible, especially since, when not misapplied,

CONCESSIONS IN RATES IN ORDER TO SECURE TRAFFIC.

it can harm no one, but may be, and often is, of great and manifest advantage, in enabling distant sections of the country to come into closer commercial relations, and to exchange to their mutual benefit their dissimilar productions, or to compete with each other in those which are similar.

But the cases must be very rare in which the larger charge in the aggregate for the shorter haul of the same kind of property over the same line in the same direction could be justified, when no other reason supported it than the fact that the traffic for the longer haul would bear no more. Manifestly such a discrimination when not imperative on other grounds is unjust; and the injustice becomes oppression when the effect is to increase the burden upon the traffic which has the shorter haul. There is a plain limit to the application of the principle that property is to be carried at rates it will bear; and the limit is reached when the rates charged are so low that further reduction would necessitate an increase of the charges upon other traffic in order to make up to the carrier such loss as the reduction causes. If some common vegetable, worth but five cents a hundred pounds more at a market a thousand miles distant than it is where it is grown, were to be transported that distance for the sum named, the producer nearer the market if subjected to a higher charge would have a right to complain that not only did the discrimination reduce the market value of his produce, but that the acceptance of the unreasonably low rates from the distant producer had a tendency to increase the charge for the shorter haul, so as to make it not only relatively, but, when considered by itself, unreasonably high.

It is a matter of public notoriety that a belief has prevailed to a considerable extent that long-haul traffic was in many cases carried at a loss; that the carriers were enabled to take it by making the charges for short-haul traffic greater than would otherwise be necessary or reasonable, and that this constituted an abuse that ought to be corrected by law. Persons who did not hold to this belief have, on the other hand, taken low charges on long-haul traffic as a proper measure for all charges, and have insisted that if the railroads could accept the low charges for one class of business they could and ought to do so for all classes. And this, as a rule, would be quite true if the railroads had it in their power to make the rates for all; which, however, is far from being the fact. There are many cases in which they have the option only to take the traffic at rates prescribed by its owners, or not to take it at all. But in respect to such cases we must repeat, by way of emphasis, that a successful appeal cannot be made to the equity of the statute on the mere ground that long-haul traffic will not bear higher rates, if in fact those it can bear, if accepted, will cause a loss to the carrier which must be made up on short-haul traffic. To have one's property carried at a loss would not be matter of right, but

of favor; and favors in transportation are not to be granted to any one class at the expense of any other.

IV. The greater charge for the shorter haul has been in some cases defended, on the ground that manufacturers and other industries were thereby favored and built up. But a question likely to arise in such cases is whether that which is done for some is not at the expense or to the unjust prejudice of others. The statutes of some of the Southern States seek to encourage manufactures by permitting special rates to be made in their favor; and railroad companies, in some cases which were brought to our notice, have entered into contracts with parties proposing to establish large manufactories or otherwise engage extensively in business whereby, in consideration of the investment of some named sum in the proposed enterprise, they agree that favorable rates, which are specified, shall be given on its traffic for a term of years. The purpose of such laws and such contracts is no doubt commendable, but the practical difficulty of giving them effect without prejudice to the interest of others is always found to be serious. Very often they tend to the benefit of large establishments and to the prejudice of small. Manufacturers are infinite in variety and extent, and, while it might be easy for those whose transactions were large to obtain the benefit of an impartial law made for the encouragement of all, the small establishments, sending out their goods in small lots and irregularly, might find the law practically of little or no value. The railroad companies, not unwilling to make long-time contracts for rates which contemplate a large business, would scarcely be expected to stipulate for them with the small establishments which exist in variety in every town and hamlet.

DEVELOPMENT OF INDUSTRIES BY LOW RATES CONSIDERED.

As a matter of fact the laws and the contracts which are made for the benefit of manufactures usually contemplate not all kinds of manufactures, but only those leading and most prominent kinds which require large capital, and whose operations are on an extensive scale. Encouragement to these is of public advantage when it wrongs no one; but it is just as much the duty of the common carrier in making its low rates on long hauls to consider whom they may ruin as whom they may build up; and while the carrier cannot be held responsible for the consequences which flow legitimately from tariffs impartially arranged, it cannot justify on the ground of public benefit the unequal rates which, however beneficial to some, may be equally mischievous to others. A great establishment, strengthened by the favor of the public carriers until it acquires the power to crush competition and actually exercises that power, may by that very fact become an enemy to the civil state; and no benefit it can give to the public in the low prices of its commodities or otherwise can compensate for the general sense of wrong which those must feel who are injured by

it, or for the sentiment which grows up in view of its operations, that the law fails to give the equality of right and privilege which it nominally promises. That some such great establishments have been fostered by the aid of the railroad companies is commonly believed; and provisions against unjust discriminations in this statute had for their object, among other things, to bring this mischief to an end. The plausible excuse of public benefit, if it ever had force in such cases, has none now, for the statute forbids what public sentiment had already condemned.

It was shown by the evidence that the rates upon long hauls were such as would admit of the pine lumber of Mississippi being sold in Wisconsin in competition with lumber there cut, and of the iron of Alabama being carried through Pittsburgh to Eastern manufactories. If the lines originating in Wisconsin and Pennsylvania give to the producers of those States corresponding rates for the traffic in the other direction under similar circumstances, this will prejudice no one; but, on the contrary, may operate to the public advantage, provided always that the rates actually charged are compensatory. The petitioner in this case claims that in no case does it carry such long-haul traffic at rates which fall below cost. By this, however, is meant only the cost of movement of the particular traffic, leaving out of view the fixed charges of the road, which must, in any event, be provided for, whether the long-haul traffic is or is not taken. This distinction between the cost of movement and the fixed charges often becomes of importance in such cases as that of the lumber trade just mentioned. That trade is new; the roads which take it were built without anticipating its springing up, and their managers made their calculation for business to meet the whole cost of operation in reliance upon such traffic as was then apparent or probable. The fixed charges of the road may, for purposes of illustration, be assumed to equal one half of the whole, the cost of movement of freight the other half. The rates laid were doubtless calculated to cover the whole, with a margin for profit, and were so laid that all traffic would contribute towards both fixed charges and cost of movement. But now comes this new business, and from the nature of the case low rates are a necessity to it; it can pay perhaps little if anything more than half what is paid by other traffic. But taking it will not increase perceptibly the fixed charges of the road, because those are made up of items that must be paid whether the traffic is large or small. What is added to the cost by taking it is simply the expense of its own handling and movement; and upon the supposition made, there might perhaps be gain to the road instead of loss in taking it at anything above half the rates which are levied upon other traffic corresponding to it in classification. It might therefore be carried at such rates without wrong to any one. But if it were carried at lower rates still, not only would the other

traffic be left to pay the fixed charges and the cost of its own movement, but it would also, to some extent, be burdened with the cost of movement of the long-haul traffic thus added to the business of the road.

The injustice of this would be very apparent, and it would become intolerable if some portion of the short-haul traffic was competitive to the long-haul traffic, and was so heavily taxed by higher rates as to make continuance impossible. It is very plain that an unrestricted power to make such rates is liable to infinite abuses, and that it may as easily be made use of to injure one enterprise as to build up another. In the earnest and sometimes unreasoning rivalry of railroad companies, it has no doubt often been employed as much to give mere volume to business as for any anticipated net revenue; and the wrongs have in such cases far exceeded any possible advantages that could accrue either to the roads themselves or to the public. It cannot be supposed that in any case the true interest of a road will be prejudiced by its being held strictly to the rule that excessively low rates on some traffic are not to be compensated for by excessively high rates on other traffic. And if rates are so graded as to violate the statutory general rule, it cannot be accepted as justification for the higher rates on the shorter haul that the lower rates on the longer haul had encouragement to manufacturers or other industries for their motive.

V. The chief ground on which the applicants pressed for relief from the long and short haul clause of the statute was that competition forced the railroad companies to make rates to and from connecting points to the level of which it was not possible to bring the charges at non-competitive points, because the doing so would cause such reduction of revenues as would force roads into bankruptcy and ultimately into suspension. It was, therefore, as was said, inevitable that in a great number of cases the greater charge should be made for the shorter haul; and nothing but putting a stop to competition by law would prevent it. This it was insisted the new law does not attempt or intend. On the contrary the importance of competition in fostering and regulating the internal commerce among the States is clearly noted. In the sixth section carriers are permitted to reduce their rates at any time, but are forbidden to raise them except after giving ten days' notice. In the fifth section the pooling of freight is forbidden, unquestionably because the practice was regarded as having a tendency to prevent or check competition. The act studiously omits to bring the steamboats and other independent water lines within its control, and must, therefore, have contemplated the continuance not only of competition, but of those things which competition renders inevitable. The existence of competitive forces to an extent that the railroad companies at competitive points are unable to control, it was therefore argued, would make out a case

COMPETITION.

of circumstances and conditions so dissimilar to those prevailing at non-competitive points as might justify the making of the greater charge for the shorter haul which was in general prohibited.

The competition which was brought to our attention as having this imperative force was, first, the competition of railroads with water-ways; second, the competition of railroads with other railroads which are not subject to the provisions of the "Act to regulate commerce;" third, the competition with each other of railroads which are subject to that act; fourth, the competition of business or trade centres with each other, operating indirectly upon the roads which form their channels of trade; and, fifth, the competition of business interests in like manner operating upon the roads by whose assistance the business is carried on. This fifth species of competition has already been remarked upon to some extent, and it has been seen that it will not justify a railroad company in discriminating between its own customers to an extent that would create an exception to the general rule the statute prescribes. We pass it now without further remark. The others demand at our hands due consideration.

I. It was fairly shown before us that instances exist, and may be found, along the routes of petitioner's lines in the States of Kentucky, Tennessee, Georgia, Alabama, Mississippi, and Louisiana, where the competition of water-ways forces down the railroad rates below what it is possible to make them at non-competitive points and still maintain the roads with success or efficiency. The reason is that the carriers by water can perform the service at very much less cost than the carriers by land. The general fact is that railroad rates for the transportation of property must approximate closely those which are made between the same points by steamer, and the steamer rates are generally, if not invariably, much below what the railroads can afford to accept upon all their business. In such cases, if competition is maintained, more must be charged at interior points than can be obtained at the points of competition; and if the competitive rates are such as are productive of some gain, however slight, the non-competitive points are likely to receive indirect advantage therefrom, while the competitive points have the larger and more direct benefit, and are afforded a choice of agencies in transportation whose rivalry may fairly be expected to keep the cost down to a minimum. The interior points may have no ground for complaint in such a case, provided the rates they are charged are in themselves just and reasonable, even though the effect be that in some cases more is charged for the short than for the long haul over the same line in the same direction. This general fact is recognized the world over; and of English railways it has been often remarked that some of them would be deprived

COMPETITION OF RAILWAYS WITH WATER-WAYS.

of much of their value if they were not allowed to meet water competition by such concessions at the points of contact as the competition would compel.

The only question that fairly arises in regard to it is whether the competition is kept within proper bounds. Vessel-owners produced evidence before us to show that the railroads put down their rates to a ruinous point in their determination to take the competitive traffic at all hazards, and eventually to crush out competition; and railroad managers retorted with evidence that the blame for unremunerative rates was upon their rivals. But the question of relative fault is not important now. Low rates are a necessity of the situation; and if railroads compete with water transportation either on the ocean or navigable rivers, they have no choice but to accept such rates. To compel the roads to observe strictly the general rule laid down by the fourth section would necessitate their abandonment of some classes of business in which their competition with water transportation is now of public importance. Vessel-owners who appeared before us to oppose the applications made for relief put their opposition in some cases explicitly on the ground that denying the applications would enable the vessel men to put up their own rates. This was to be expected, and is far from being blameworthy if in fact their business is not now reasonably profitable; but it is suggestive of the fact that the interest of the public and that of any class of public carriers is not in all respects identical.

It is more than probable that the complaints made by the vessel owners against certain of the railroads are to some extent well founded; that the railroads have not only made the rates at points of competition with vessels much too low in order that they might at all events obtain the business, but that this has been done in disregard alike of right and of true policy. This is only saying that in their wars of rates with vessel-owners they have sometimes shown the same recklessness as in like wars among themselves; but the fact still remains that they must either be allowed to compete with vessel-owners and make low charges for the purpose, or they must leave vessel-owners in possession of the business without the check upon charges which competition would afford.

The question here is whether this limitation of competition was intended by the statute; or, on the other hand, did Congress intend that the existence of competition might in some cases make out the dissimilar circumstances and conditions which would support a greater charge for the shorter haul, even though it might be over the same line in the same direction, the shorter being included in the longer distance? On this subject the history of the proceedings in Congress which resulted in the adoption of the fourth section as it stands as instructive, and with such brevity as is practicable it is recited here, not as determining conclusively the construc-

tion of the section, but as showing beyond question that the benefits of competition were meant to be retained, and that exceptions to the rigorous general rule were provided for to meet the contingencies which the competition might create.

In the report of the Senate select committee, submitted January 18, 1886, known as the Cullom report, is found the following language:—

"No question connected with the problem of railroad regulation has given the committee more perplexity than that relating to the utility and expediency of legislation prohibiting a carrier from charging more for a shorter than a longer haul under any circumstances; not that we have any doubt as to the injustice of such a charge under most circumstances, but because it seems inexpedient to enforce such a regulation under all circumstances.

"When the effect of the proposed prohibition is considered with reference to the whole internal commerce of the United States, and especially with reference to the necessity of preserving the prevailing cheap rates for long distance transportation, there is reason to fear that the result of rigidly enforcing the proposed regulation would be to stifle competition in numberless cases where it now exists and is to the general public interest, and perhaps to deprive the country of the benefits of the low through rates now and for years given to and from the tide-water, without practical or appreciable advantage to intervening points."

The bill introduced with the report contained the following provision upon this subject:—

"Section 4. That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or property for a shorter than for a longer distance over the same line in the same direction, and from the same original point of departure, if such greater charge for the shorter distance constitute an unjust discrimination; but such greater charge for a shorter distance shall be presumptive evidence of unjust discrimination, which may, however, be rebutted by the common carrier.

"Upon application to the commission appointed under the provisions of this act, such common carriers may, in special cases, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the commission may from time to time make general rules covering exceptions to any such common carrier in cases where there is competition by river, sea, canal, or lake, exempting such designated common carrier from the operation of this section of this act; and when such exceptions shall have been made and published they shall have like force and effect as though the same had been specified in this section."

Afterwards, and before debate, the committee on February 16,

1886, reported as a substitute for this bill another, in which the following language is found :—

"Sec. 4. That it shall be unlawful for any common carrier to charge or receive any greater compensation in the aggregate for the transportation of passengers or property subject to the provisions of this act for a shorter than for longer distance over the same line in the same direction, and from the same original point of departure: provided, however, that upon application to the commission, etc. . . . [Substantially as before.]

The formal discussion of the measure was commenced April 14, 1886, the chairman of the select committee opening the debate by a speech in which he said concerning the fourth section:—

"It is agreed that this is the principle that should be observed as a general rule. The committee found, however, that the principle was not of universal application; that there were cases in which the railroads were compelled to make lower rates for longer than for shorter distances by the great law of competition, which is stronger than any law we can make, and that in some cases it would be a great hardship to the public as well as the railroads to rigidly enforce the general principle."

It is perfectly clear that the intention of the original framers of the Senate bill was to leave it to the discretion of the commission to exempt carriers from the operation of the rule in cases when the "great law of competition" made such a relaxation proper, having in view the interests of the carriers and the people.

On May 6, 1886, Senator Cullom moved to amend the section by striking out the words "covering exceptions to any such common carrier in cases when there is competition by river, sea, canal, or lake." He supported this motion by the suggestion that these words were not necessary, and that without them the commission would have the same power and more. Senator Harris favored the amendment as giving a broader discretion to the commission, and it was adopted.

On May 12 a motion was made by Senator Camden to change the phraseology of the first part of the section, so that it should read "of like kind of property under substantially similar circumstances and conditions." This amendment was agreed to as a substitute for a previous amendment proposed by Senator Camden, and with little additional debate.

The bill was finally passed on the part of the Senate, section 4 remaining substantially as above, with the insertion of the following:

"But this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance."

The bill then went to the House of Representatives, and was referred to the Committee on Commerce. That committee reported as a substitute for it the bill before pending in the House, which

contained the following provision upon the subject embraced in section 4 of the Senate bill:—

"That it shall be unlawful for any person or persons engaged in the transportation of property as provided in the first section of this act to charge or receive any greater compensation for a similar amount and kind of property, for carrying, receiving, storing, forwarding, or hauling the same, for a shorter than for a longer distance, which includes the shorter distance on any one railroad; and the road of a corporation shall include all the road in use by such corporation, whether owned or operated by it under a contract, agreement, or lease by such corporation."

In opening the debate on July 21, 1886, Mr. Reagan, chairman of the House Committee on Commerce, severely criticised the fourth section of the Senate bill, saying that the closing part of the section substantially nullified the former part, while his proposed substitute contained an absolute prohibition.

The minority of the committee, four in number, opposed the substitution, and in their report the following passage occurs:—

"Nor do the minority favor the provision prohibiting a greater charge for a shorter than a longer haul, as it was shown to a satisfactory degree, as we think, in the hearing that, where two competing points were connected by water as well as rail, it was impossible for the railroads to secure the traffic unless they made their rates as low as the water rates, and that while they might be able to do this on a portion of their traffic, it would be destructive of their interests to reduce all their rates to those which were forced upon them between certain points by the competition of the water routes."

It is obvious, therefore, that, in the House as well as in the Senate it was understood that the existence of competition was intended to be included in the margin of discretion provided for by the Senate measure. The question as to this point was distinctly marked; the debate, so far as this section was concerned, was upon that basis. On July 30, 1886, the substituted bill was agreed to and passed on the part of the House. A conference committee was appointed, and at the second session of the Congress that committee agreed upon a report, which was presented to the Senate December 15, 1886. By this report the fourth section of the Senate bill was amended so as to read as it now stands.

The work of the conference committee was very elaborately and carefully performed. The two bills which were referred to presented very clearly the views which had prevailed in the two houses respectively on the general subject of relative charges on long and short haul traffic—the House view of an inflexible rule, forbidding absolutely the greater charge for the shorter haul, and the Senate view that the rule should be subject to exceptions when the circumstances and conditions required it. The conference

committee accepted deliberately the Senate view, and presented it in the report to the two houses. In the Senate the report, before adoption, was discussed, and what was proposed by it on this point of vital interest was very distinctly brought out and made prominent; and in the House, where also the report was adopted, nothing which was said by any one indicated that the situation was otherwise understood.

It is impossible to resist the conclusion that in finally rejecting the "long and short haul clause" of the House bill, which prescribed an inflexible rule, not to be departed from in any case, and retaining in substance the fourth section as it had passed the Senate, both houses understood that they were not adopting a measure of strict prohibition in respect to charging more for the shorter than for the longer distance, but that they were, instead, leaving the door open for exceptions in certain cases, and, among others, in cases where the circumstances and conditions of the traffic were affected by the element of competition, and where exceptions might be a necessity if the competition was to continue. And water competition was beyond doubt especially in view.

In thus deliberately making provision for competition, even though it might be necessary to allow for the purpose exceptions to the general rule laid down in the statute, Congress must be supposed to have done so because the public interest required it. That competition is the life of trade is one of the most generally accepted of maxims; among its principal benefits is the protection it gives against extortionate charges. But legitimate, open, and fair competition was meant; not everything that has been done under the name of competition, and which in many cases has been equally destructive of public and of private right. Among the common abuses have been the granting of special favors in exceptional rates, rebates, drawbacks, etc., all of which are now expressly prohibited by law when they assume the form of unjust discrimination. There has also been favoritism between places and communities as a result of violent competition; but this also is no longer permissible. Other similar wrongs will be referred to further on; but the wars of rates, under the excitement of which traffic is carried at a loss, to be made good by excessive charges on other traffic at other times, is not the least of those from which the public has suffered. And these wars are as indefensible when vessel owners are their objects as when made between the railroads themselves, and are not to be justified on any pretence of competition. Water transportation is entitled to such traffic as in fair rivalry and at fair prices it can take, and the railroads in competition with it must recognize this right and not recklessly attempt to preclude its exercise. It is true that while the roads are obliged to publish their tariffs and the carriers by water are not, the former are at a

disadvantage in the competition; but possibly the law in this regard may be amended if justice shall be found to require it.

Every railroad company ought, when it is practicable, to so arrange its tariffs that the burden upon freights shall be proportional on all portions of its line and with a view to revenue sufficient to meet all the items of current expense, including the cost of keeping up the road, buildings, and equipment, and of returning a fair profit to owners. But it is obvious that, in some cases, when there is water competition at leading points, it may be impossible to make some portion of the traffic pay its equal proportion of the whole cost. If it can then be made to pay anything toward the cost, above what the taking of it would add to the expense, the railroad ought not, in general, to be forced to reject it, since the surplus, under such circumstances, would be profit. As has been tersely said by M. de la Gournerie, formerly inspector-general of bridges and railways in France, a railroad "ought not to neglect any traffic of a kind that will increase its receipts more than its expenses;" and long-haul traffic which can only be had on these terms may sometimes be taken without wronging any one, when to carry all traffic, or even the major part of it, at the like rates would be simply ruinous. But we desire to apply generally to every kind of competition herein discussed the observation above made, that when competition leads to the transportation of property below actual cost, fairly computed, it ceases to be legitimate. Fair and reasonable competition is a public benefit; excessive and unreasonable competition is a public injury. Competition is to be regulated, not abolished. The other sections of the law of themselves imply ample authority for its regulation, and, in connection with the fourth section, support the interpretation that it is wholly inadmissible to press competition to a point where expenses are increased beyond the increase of income.

II. The question whether railroad competition with other railroads which are not subject to the control of this law can present a case of dissimilar circumstances and conditions, within the meaning of section 4, may possibly be one of greater doubt. The classes of roads not thus subject, and whose competition might be severe, are the Canadian roads and roads which are entirely within the control of a single State. As regards the latter, it is not improbable that cases exist of roads not restrained by any long and short haul clause corresponding to the federal statute, which are so situated in respect to rivals coming under the law of Congress as to be able to monopolize to the public detriment the traffic at important points of competition unless the latter are given equal freedom of action. We do not understand, however, that any of the pending applications of this nature, and we therefore leave such cases to be considered when they shall be presented more directly. Competition with

COMPETITION OF RAILWAYS WITH OTHER RAILWAYS NOT SUBJECT TO UNITED STATES STATUTE

Canadian roads may, it is believed, present a case of dissimilar circumstances and conditions. Whenever such roads compete with roads in the United States for business between one part of our country and another, a state of circumstances arises and exists as to such business which justifies American roads in meeting such competition by a corresponding reduction of rates, without regard to the fact that in so doing the rates between the terminals may be reduced below rates to and from intermediate places which are otherwise reasonable and just in themselves. The fact that American roads are left free to make such competition is of itself an assurance that no extensive war of rates is likely to be engaged in by the Canadian roads, or, if engaged in, to be long pursued.

III. The competition with each other of the railroads which are subject to the federal law can seldom, as we think, make out a case of dissimilar circumstances and conditions within the meaning of the statute, because it must be seldom that it would be reasonable for their competition at points of contact to be pressed to an extent that would create the disparity of rates on their lines which the statute seeks to prevent. But we cannot now assume that no case has arisen or can hereafter arise which on its own peculiar facts and in consideration of its special equities can be deemed to present a just claim under the statute.

COMPETITION OF RAILWAYS WITH EACH OTHER.

First, it may be observed here that in some parts of the country it is not easy to separate railroad competition altogether from competition by the water-ways.

Water competition is not limited in force strictly to the points of contact of water and rail lines, but extends its influence to an indefinite distance therefrom, qualifying to greater or less extent the all-rail rates. But passing that consideration by, it will be found on investigation that cases will exist in which, unless the force of strictly railroad competition is allowed to create exceptions under the statute, an existing competition which is supposed to be of public interest must come to an end. And where that is the case the strong lines will in general be gainers at the expense and sometimes to the destruction of those which are weaker.

One such case is that of the railroad extending from Pittsburgh, Pa., parallel to the Pennsylvania Railroad as far as Youngstown, and thence to Ashtabula, Ohio, where, through connection with the Lake Shore, it gives to the people of Pittsburgh and Youngstown competition with the Pennsylvania road in their business to and from New York and New England. The peculiarity of the competition is, that the business on the roads respectively is started in opposite directions when destined to the same point, so that on east-bound traffic from Pittsburgh the haul by one road is shorter than from Youngstown and longer by the other. As the Pennsylvania road has the shorter line, it is in position to determine

what the rates shall be, and the longer line has no option but to conform to them. In making them the leading road gives to Pittsburgh lower rates than to Youngstown, as it justly should do, in recognition of the geographical position. But the other road must do the same, though over its line the traffic between Youngstown and the seaboard will have the shorter haul. There is nothing unreasonable or unjust in this; and if the longer line were to attempt a change which should reduce the rates from Youngstown to the level of those of Pittsburgh it would in doing so only open a war of rates in which all the advantages would be with its rival. Finding itself in this dilemma, it applied to the commission for an order permitting a greater charge to be made on traffic to and from Youngstown than is made on that to and from Pittsburgh, and its application is strenously opposed by the Pennsylvania road, which insists that competition by this roundabout route is illegitimate and ought not therefore in any manner to be aided.

Whether this position is sound the commission may determine hereafter. It is sufficient to say of the case at this time that it is one—and not a solitary instance—in which a strict application of the general rule laid down by the statute must be fatal to competition. If the competition in itself is illegitimate, it may be right to permit its destruction. But it is not admitted by those interested in the road thus mentioned that its case is of this nature. It is shown that it was constructed by Pittsburgh capital for the express purpose of the competition; and it appears that, though the route is indirect, the competition has given it considerable business, and large investments have been made in reliance upon its continuance.

One fact obvious on the statement of this case is that the wrong against which the long and short haul clause of the statute is aimed is not to be found in it. When the greater charge for the shorter haul over the same line in the same direction is spoken of, the natural suggestion to the mind is of a line leading with some directness to the place to which the traffic is destined; and there seems to be in such greater charge a manifest unfairness, since it deprives the place of shipment nearest the destination of its proper advantage of situation. But in the case stated the position is the opposite to this; the greater charge for the shorter haul preserves the proper advantage of situation, and has in itself no element of injustice to localities. It is the situation which forces upon the road an unequal charge which is nevertheless not unfair, and a strict application of the statute must compel the surrender of what is now competitive traffic to the older and more direct route whose very conformity to the general rule precludes conformity by the competitor.

There are other cases in the country of roads now taking part in

competitive traffic which the peculiarities of situation will compel them to abandon if the long and short haul clause of the statute is strictly applied. This to some extent might be the case with certain north and south roads, like the road from Cincinnati to Toledo, and that from New Albany to Chicago, which have heretofore engaged considerably in east and west bound traffic which they deliver to or receive from other roads crossing them, or at their terminals. In many cases these roads have been accustomed to make the greater charge for the shorter haul simply because the direction they run compels it; but in doing so they may wrong no one, because the rates are not determined by them but by the direct east and west lines, and are made with regard to relative distance. Both the roads named now have applications pending for relief from an embarrassment for which they are not themselves responsible; and they aver, with plausibility at least, that the public interest will suffer if they are shut out from such share in competition as they have hitherto taken. We do not pass upon these cases finally at this time, and, therefore, do not undertake to say of them that they constitute cases in which the competition of roads subject to the federal law creates the dissimilar circumstances and conditions which make up an exceptional case. But this brief reference to the facts is suggestive of a possibility, at least, that the exceptional case may exist; and if it does exist a strict enforcement of the general rule might be found quite as injurious to the public interests as to those of the railroads which would thereby be shut out from competition.

IV. Whether the competition of towns which are trade centres or distributing points can in any case make out the dissimilar circumstances and conditions independent of the competition of the carriers is a question which may be said to be presented by the evidence taken, but not with such distinctness as to call for an expression of opinion at this time. The pre-eminence of such trade centres in the territory reached by the petitioner's roads is peculiar, and has probably being increased by the concessions in rates which the railroads have made to them, while making less concessions or none at all to less important stations. This condition of affairs tends to perpetuate itself, and the disparity of rates as between competitive and non-competitive towns—the former being the "trade centres"—must have had some influence to increase steadily the disparity in growth and prosperity.

COMPETITION OF TRADE CENTRES.

By some of the witnesses before us this was bitterly complained of, while by others it was defended as being best for both classes of towns. The smaller towns in this part of the country, it was said, are dependent on the trade centres for their supplies, and they get indirectly the benefit of low rates to the distributing points in lower prices than could otherwise be given to them. In proportion also as the distributing points are prosperous, they can and

do extend to the dealers at other points credit and indulgence. The prevalence of such ideas, and the acting upon them in making freight tariffs, gives to railroad managers a power of determining within certain limits what towns shall be trade centres, and what their relative advantages; and while it may be, as they assert it is, that in deciding upon rates under the pressure of the competition of trade centres they endeavor to do justice between them, yet as they do not, at the same time, feel a like pressure from non-competitive points, it is obvious that justice to such points is in great danger of being overlooked, and it is altogether likely that it is so to some extent.

One result is that towns recognized by railroad managers as trade centres come to be looked upon as towns with special privileges, and other towns strive for recognition as such, and complain perhaps of injustice when they fail. It was made very clear by the evidence produced in behalf of the railroads that the exceptionally favorable rates which were given to certain localities were in some cases given to build up trade centres; and as they had had that effect, and large establishments had been located at such centres, invited by the favoring rates, it was urged that there would be injustice in now compelling the roads to go back to the rule of equality. Of this it may be said, first, that as between different localities, it is no sound reason for discriminating in favor of one as against another that the purpose is to build up the favored locality as a trade centre; and, second, if the discrimination has existed and has had its effect, the fact that large establishments have thereby been encouraged is no reason why the injustice should be perpetuated. This statute aims at equality of right and privilege, not less between towns than between individuals, and it will no more sanction preferential rates for the purpose of perpetuating distinctions than of creating them.

These general views will indicate as far as we deem at this time necessary the bounds within which the railroad managers must limit their action in making charges which are greater in the aggregate for the transportation of passengers or of the like kind of property for a shorter than for a longer distance over the same line in the same direction, the shorter being included in the longer distance. With responsibility to the law and to the restraining power of the commission in case the bounds are exceeded, it may confidently be expected that all carriers will bring themselves into conformity with the general law so far as it may be found reasonably practicable, and that the occasions for special interference will not be numerous. Our observation and investigations so far made lead to the conclusion that strict conformity to the general rule is possible in large sections of the country, without material injury to either public or private interests; and that in other sections the exceptions can be and ought to be made less numerous than they

have been hitherto, and that when exceptions are admitted the charges should be less disproportionate. Very many of the roads, as we are informed, have so arranged their tariffs as to make no exception whatever; and where that has been proved to be reasonably feasible, return to the former custom cannot be tolerated. In any case in which a company fails to bring its tariffs into conformity with the general rule, if parties whose interests are thereby unfavorably affected complain, it must be prepared to justify its action by a showing of circumstances and conditions which render it just and reasonable.

In the views above expressed the members of the commission, after full consideration, are unanimous.

The order for temporary relief which was made in favor of the petitioner will be allowed to remain in force until the day originally limited for its expiration, and in the meantime its officers will have the opportunity to make through revision of its freight and passenger tariffs, in order to bring them as nearly as may be reasonably feasible into harmony with the general rule of the statute and with the views expressed in this opinion. That they may be brought much nearer to conformity then they now are without the sacrifice of any substantial interest, we have very little question; and as business adapts itself to the new principle established by Congress, it will no doubt be found that exceptions can safely and steadily be made less and less numerous.

ORDER.

The other applications for relief under this section which remain to be disposed of are as follows: Fifteen are by the Richmond & Danville Railroad Co., The East Tennessee, Virginia & Georgia Railroad Co., and other members of the Southern Railway and Steamship Association, which is an association of railroad and steamship companies operating lines of transportation in the territory south of the Ohio and Potomac and east of the Mississippi River. Eleven are by other railroad lines in the same territory, the Mobile and Ohio, "Queen and Crescent," Illinois Central, and others. Two are on behalf of companies in Louisiana and Texas. Seven are presented by the various transcontinental lines. One is in favor of the New York, New Haven & Hartford and other companies operating short lines in Connecticut, Rhode Island, and Massachusetts, which also seek relief against alleged water competition. One is filed by the Delaware & Hudson Canal Co., and another by the Rome, Watertown & Ogdensburg Railroad Co., in the State of New York, asking relief in respect to Canadian competition. Four are presented in behalf of the Pittsburgh & Lake Erie, the Cincinnati, Hamilton & Dayton, and two other roads similarly situated. One by the Mason City & Fort Dodge Co., a north and south road in the State of Iowa. Four are in behalf of certain roads in the vicinity of Peoria. Two are in behalf of roads in Southern Illinois, relating to their connections south of

the Ohio. Three are by the Wisconsin Central and two other roads in Wisconsin and Minnesota. One by the New York, Philadelphia & Norfolk, in Delaware. One by the Memphis & Little Rock, in Arkansas; and one by the Detroit, Grand Haven & Milwaukee in the State of Michigan.

The temporary orders which have been made on some of these petitions will in like manner be permitted to remain in force until the expiration of the time originally limited in each. No further order will be made upon any of the petitions, for although some two or three of the cases may not, by the facts recited in the applications for relief, be brought strictly within the principles above discussed, yet they all present what are claimed to be different circumstances and conditions adequate to authorize exceptions to the general rule; and if the petitioners are persuaded that the fact is as they represent, they should act under the statute accordingly.

The points that are intended to be decided at this time are as follows:—

First. That the prohibition in the fourth section against a greater charge for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance, as qualified therein, is limited to cases in which the circumstances and conditions are substantially similar.

Second. That the phrase "under substantially similar circumstances and conditions," in the fourth section, is used in the same sense as in the second section; and under the qualified form of the prohibition in the fourth section carriers are required to judge in the first instance with regard to the similarity or dissimilarity of the circumstances and conditions that forbid or permit a greater charge for a shorter distance.

Third. That the judgment of carriers in respect to the circumstances and conditions is not final, but is subject to the authority of the commission and of the courts, to decide whether error has been committed, or whether the statute has been violated. And in case of complaint for violating the fourth section of the act the burden of proof is on the carrier to justify any departure from the general rule prescribed by the statute by showing that the circumstances and conditions are substantially dissimilar.

Fourth. That the provisions of section one, requiring charges to be reasonable and just, and of section two, forbidding unjust discrimination, apply when exceptional charges are made under section four as they do in other cases.

Fifth. That the existence of actual competition which is of controlling force, in respect to traffic important in amount, may make out the dissimilar circumstances and conditions entitling the carrier to charge less for the longer than for the shorter haul over the

same line in the same direction, the shorter being included in the longer, in the following cases:—

1. When the competition is with carriers by water which are not subject to the provisions of the statute.

2. When the competition is with foreign or other railroads which are not subject to the provisions of the statute.

3. In rare and peculiar cases of competition between railroads which are subject to the statute, when a strict application of the general rule of the statute would be destructive of legitimate competition.

Sixth. The commission further decides that when a greater charge in the aggregate is made for the transportation of passengers or the like kind of property for a shorter than for a longer distance over the same line in the same direction, the shorter being included in the longer distance, it is not sufficient justification therefor that the traffic which is subjected to such greater charge is way or local traffic, and that which is given the more favorable rates is not.

Nor is it sufficient justification for such greater charge that the short-haul traffic is more expensive to the carrier, unless when the circumstances are such as to make it exceptionally expensive, or the long-haul traffic exceptionally inexpensive, the difference being extraordinary and susceptible of definite proof.

Nor that the lesser charge on the longer haul has for its motive the encouragement of manufactures or some other branch of industry.

Nor that it is designed to build up business or trade centres.

Nor that the lesser charge on the longer haul is merely a continuation of the favorable rates under which trade centres or industrial establishments have been built up.

The fact that long-haul traffic will only bear certain rates is no reason for carrying it for less than cost at the expense of other traffic.

Ex parte RICHARD KOEHLER.

(*Advance Case, U. S. C. C., D. Oregon. July* 4, 1887.)

The fact that there is competition in the carriage of persons or property to or from a particular place, is a circumstance that justifies a common carrier under section 4 of the Interstate Commerce Act to charge less for a long haul to or from said place than a short one included therein.

Section 2 of the Interstate Commerce Act in effect prohibits the giving of passes of free carriage to particular persons, and the exception allowed in

section 22, in favor of officers and employees of the road, does not include the families of such persons.

John W. Whalley for the petitioner.

DEADY, J.—On June 25, 1887, the receiver of the Oregon & California Railway Co. filed his petition in this court asking for direction touching certain questions arising in the management of the road under the Interstate Commerce Act. FACTS.

The road is 400 miles in length, and lies wholly in this State, between Portland and the southern boundary thereof; and since January 19, 1885, it has been operated by the petitioner, as receiver of this court.

It appears from the petition that the O. & C. road will soon be connected with the California & Oregon road, when the two will form a through line between Portland and San Francisco; that between these points there is also water communication by steamers and sail-vessels, that carry passengers and freight at less than the average cost of transportation by rail between said places and all intervening stations; that the road of the Oregon Pacific Railway Co. runs from Yaquina Bay to Albany in this State, and there crosses the line of the O. & C. road, from whence it is being constructed to the eastward; that with the aid of steamboats on the Wallamet river it receives a portion of the freight which would otherwise be carried on the O. & C. road; that the bulk of the freight obtained by the Oregon Pacific Railway Co. from the Wallamet valley is carried to Yaquina Bay and thence to San Francisco, at special rates, on steamers of the Oregon Development Co., which are apparently under the same control as the O. P. road; that the Canadian Pacific road connects with a line of steamers running between its western terminus and San Francisco; and that in order to compete with such all water and rail and water transportation between Portland and points to the north and east of it, and in the Wallamet valley on the one hand and San Francisco on the other, it is necessary to make corresponding rates on the O. & C. road.

The petitioner also states that it will be necessary for him, under section 6 of the Interstate Commerce Act, in conjunction with those in control of the connecting lines, to make the rates between Portland and San Francisco; and in view of these general statements and many illustrative details contained in the petition, he asks (1) whether, under the Interstate Commerce Act, such rates can be made, for through travel and traffic, as will enable the O. & C. road to compete for the same, at points where competition by water or rail exists, although the rates for the long haul between Portland and San Francisco or intervening points may be less than those for a shorter haul in the same direction between

said places or such points; and (2) whether, in conjunction with the Northern Pacific Railway Co. or other transportation lines, the O. & C. road may meet the competition of the Canadian Pacific road or other transportation lines, on transcontinental business originating to the north and east of Portland, although its share of the through rate may be less than the local charges over the road or its share of the through rate on competitive business between Portland and San Francisco.

The petitioner states that it has been customary to issue passes to the families of the employees of the road as well as the employees themselves, and that the same have been regarded as a part of the consideration for the services of the latter, and asks whether, under sec. 22 of the Interstate Commerce Act, he can issue such passes over the O. & C. road to be used on interstate travel, and whether he can interchange the same for the passes of other roads to be used in such travel by the families of the employees of such other roads.

The Interstate Commerce Act applies, by its own terms, "to any common carrier engaged in the transportation of passengers or property wholly by railroad or partly by railroad and partly by water," when both are used under a common control, management, or arrangement, for a continuous carriage or shipment, not "wholly within one State," and all charges for any such service "shall be reasonable and just."

Section 4 of the act provides: "That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, *under substantially similar circumstances and conditions*, for a shorter than for a longer distance over the same line, in the same direction; the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act, to charge and receive as great compensation for a shorter as for a longer distance."

From *Ex parte* Koehler, 23 Fed. Rep. 529, it appears that the O. & C. company was formed under the general incorporation act (1862) of Oregon, passed in pursuance of sec. 2 of article 9 of the constitution of the State, which provides for the formation under general laws only, and reserves to the legislature the power to alter, amend, or repeal any act passed in pursuance thereof; "but not so as to impair or destroy any vested corporate right;" and sec. 36 of this corporation act provides that a railway corporation formed thereunder "shall be deemed a common carrier, and shall have power to collect and receive such tolls or freights for transportation of persons or property thereon, as it may prescribe." Or. Laws, 532.

EX PARTE KOEHLER REVIEWED.

From these premises I concluded in that case, that this corporation has a vested right to collect and receive a reasonable compensation for the transportation of persons and property over its road, which the Legislature cannot impair or destroy; and that while the Legislature may prescribe rates of transportation which will be presumed reasonable, until the contrary appears, the judiciary are the final judges of what is reasonable or not, or what "impairs" the vested right of the corporation to have a reasonable compensation for its services. RIGHT TO COMPENSATION.

Following this conclusion, I held in the same case that, notwithstanding the act of the Oregon Legislature (Ses. L., 1885, p. 39), called "the Hoult act," prohibiting the corporation from charging a greater rate for carrying similar property for a short haul than a long one, in the same direction, the O. & C. road might, for the purpose of retaining and securing business, at a point or place where there are competing lines of transportation, charge less for a long haul than a short one, in the same direction, so long as the charge for the latter is reasonable. DECISION IN EX PARTE KOEHLER.

In the course of the opinion it was said: "I assume that the State has the power to prevent a railway company from discriminating between persons and places for the sake of putting one up or another down, or any other reason than the real exigencies of its business. Such discrimination, it seems to me, is a wanton injustice, and may therefore be prohibited. It violates the fundamental maxim *Sic utere tuo ut alienum non laedas*, which in effect forbids any one to so use his property as to injure another. . . . But where the discrimination is between places only, and it is the result of competition with other lines or means of transportation, the case, I think, is different. For instance, the act prescribes a reasonable rate for carrying freight between Corvallis and Portland, or from either to points intermediate thereto. But Corvallis is on the river and has the advantage of water transportation for some months in the year. The carriage of goods by water usually costs less than by land, and as watercraft are allowed to carry at a rate less than the maximum fixed for the railway, they will get all the freight from this point unless the latter is allowed to compete for it. But if, to do this, it must adopt the water rate for all points intermediate between Portland and Corvallis, where there is no such competition, it is in effect required to carry freight to and from such points at a less rate than that which the Legislature has declared to be reasonable, or else give up the business at Corvallis altogether.

If the Legislature cannot require a railway corporation, formed under the law of the State, to carry freight for nothing, or at any less rate than a reasonable one, then it necessarily follows that this provision of the act can not be enforced, so far as to prevent the railway from competing with the water-craft at Corvallis and

other similarly situated points, even if in so doing they are compelled to charge less for a long haul than a short one in the same direction.

It is not the fault or contrivance of the railway company that compels this discrimination. It is the necessary result of circumstances altogether beyond its control. It is not done wantonly for the purpose of putting the one place up or the other down, but only to maintain its business against rival and competing lines of transportation. In other words the matter, so far as the railway is concerned, resolves itself into a choice of evils. It must either compete with the boats during the season of water transportation, and carry freight below what the Legislature has declared to be a reasonable rate, or abandon the field and let its road go to rust. Nor can the shipper at the non-competing point or over the short haul complain, so long as his goods are carried at a reasonable rate. It is not the fault of the railway that the shipper, who does business at a competing point, has the advantage of him. It is a natural advantage to which he must submit unless the Legislature will undertake to equalize the matter by prohibiting the carriage of goods by water for a less rate than by rail; and when this is done, the inequalities of distance, as well as place, may also be overcome by requiring goods to pay the same rate over a short haul as a long one.

This opinion has been before the world for more than two years, and on account of the importance of the subject has attracted some attention, but so far as I am aware it has received no unfavorable criticism. And time and reflection has fully satisfied me of the correctness of the ruling.

EX PARTE KOEHLER No. 2 CONSIDERED.

In *Ex parte* Koehler, 25 Fed. Rep. 73, I had occasion to consider this subject again, on account of the competition at Corvallis with the Oregon Pacific Railway Company running in connection with the steamers of the Oregon Development Company for freight destined to and from San Francisco, in which the receiver was instructed to make rates that would enable the O. & C. road to compete for freight with the O. P. company at Corvallis.

COMMON-LAW RIGHT—AUTHORITIES.

At common law a carrier has a right to charge less for a long haul than a short haul in the same direction, but the rate for the short haul must be reasonable.

In A., T. & S. R. *v.* D. & N. O. R., 110 U. S. 683, the supreme court held that the former could not be required to carry freight over its road from Kansas City to Pueblo, Colorado, for the latter, at the same rate it obtained on a division of through rates among combined companies, of which it was one, on a through line from Kansas to Denver, the latter being a competitive point for the business to and from the Missouri river, while Pueblo is not. And this conclusion was reached notwithstanding

the constitution of Colorado (§ 6, art. 15) prescribes: "All individuals, associations and corporations shall have equal rights to have persons and property transported over any railroad in this State, and no undue or unreasonable discrimination shall be made in charges or facilities for transportation of freight or passengers within the State."

The judgment of the court is authority, then, for this proposition: Two or more corporations, in order to meet competition, may form a through line and charge through rates for transportation thereon, which may be less than the sum of the local rates of the several roads constituting the line; and the portion of the through rate received by each corporation may be less than the local rate charged by said corporation for carrying freight over the whole length of its road.

INTERSTATE COMMERCE ACT—INTENTION.

The Interstate Commerce Act is intended, among other things, to prevent discrimination between long and short hauls, except where they are made under substantially dissimilar circumstances and conditions. In my judgment Congress, in limiting the prohibition contained in sec. 4 of the act against discriminating charges between long and short hauls, to cases where such hauls are made "under substantially similar circumstances and conditions," has recognized the rule laid down in *Ex parte* Koehler as a proper one.

COMPETITION CONSIDERED—AUTHORITIES.

Freight carried to or from a competitive point is always carried under "substantially *dis*-similar circumstances and conditions" from that carried to or from non-competitive points. In the latter case the railway makes its own rates, and there is no good reason why it should be allowed to charge less for a long haul than a short one. When each haul is made from or to a non-competitive point, the effect of such discrimination is to build up one place at the expense of the other. Such action is wilfully unjust, and has no justification or excuse in the exigencies or conditions of the business of the corporation.

In the former case the circumstances are altogether different. The power of the corporation to make a rate is limited by the necessities of the situation. Competition controls the charge. It must take what it can get, or, as was said in *Ex parte* Koehler, "abandon the field and let its road go to rust."

Competition may not be the only circumstance that makes the condition under which a long and short haul are performed substantially dissimilar. But certainly it is the most obvious and effective one, and must have been in the contemplation of Congress in the passage of the act.

Section 6 of the act of July 1, 1862 (12 Stat. 489), incorporating the Union Pacific, provides that the United States shall have the preference in the use of the road of the corporation for the transportation of mails, troops, and munitions of war "at fair and rea-

sonable rates of compensation not to exceed the amount paid by private parties *for the same kind of service.*"

In the Union Pacific R. Co. *v.* U. S., 104 U. S. 662, and 117 U. S. 355, a question arose under this section, as to what compensation the corporation was entitled to receive for transporting persons connected with the postal and military service of the government over the line of its road, when it appeared from the finding of the court of claims that the uniform rate of the Union Pacific for carrying passengers over its road between Council Bluffs and Ogden, on tickets purchased at either of these points, was $78.50; but by contract with connecting railway corporations passengers were carried on through tickets from New York to San Francisco at reduced rates, of which the Union Pacific received as its proportion $54 a passenger. 117 U. S. 362.

As stated by the supreme court, 117 U. S. 363: "The contention of the United States is, that local passengers carried on it account between Council Bluffs and Ogden, shall be carried on the same rates as are charged for through passengers passing between these points, as part of a journey over a whole line, although a difference is made in respect to all other persons."

The question was decided in favor of the corporation, the court holding, in the language of the syllabus, 117 U. S. 355: "The service rendered by a railway company in transporting a local passenger from one point on its line to another is not identical with the service rendered in transporting a through passenger over the same rails."

The decisions of the supreme court in these two cases are quite recent (1881, 1883, and 1885), and were doubtless present in the mind of Congress at the passage of the Interstate Commerce Act. In effect they both hold that a short haul without competition is not "a like service," or a service performed under "similar circumstances and conditions," with a long one subject to competition —and that the circumstances in such case are so dissimilar as to warrant discrimination or a less rate over the long haul than the short one.

Section 90 of the English Railway Act of 1845 (8 and 9 Vic., ch. 20), requires equality of rates for the passage of goods "passing only over the same portion of the line of said railway *under the same circumstances.*"

In Denaby Main Colliery Co. *v.* M. S. & L. R. Co. (L. R. 10 H. of L. 97; s. c., 20 Am. & Eng. R. R. Cas. 293), it was held, in an action against the defendant for overcharges, made in violation of the act, in carrying coals from a group of collieries situate at different points along the line of its road at a uniform rate, that the act only applied to goods passing between the same termini and over no other part of the line; and that inequality of rate, where unequal distances are traversed, does not constitute a preference

contrary to the act. In other words, the court held that two tons of coal passing over the road of the defendant between B and C did not pass over such portion of its line "under the same circumstances," if one of them also passed over that portion of the road between A and B, and therefore the defendant was not guilty of an infraction of the act, when it charged no more for carrying a ton of coal from A to the point C than it did from B to such point.

But under the Interstate Commerce Act, mere difference in distance is not such a circumstance as will justify a greater or even an equal charge for a short haul than a long one. Yet Congress must have contemplated that there might be such a difference in the circumstances attending a long and a short haul as would justify such charge—as would make it necessary for a railway corporation, in the retention and acquisition of the business for which it is constructed and operated, to charge less for a long haul than a short one. Congress never intended to make of this act a Procrustean bed, in which the conduct of the business of all the roads engaged in interstate commerce shall be made to conform to one arbitrary rule without reference to the probable and even unavoidable difference in the conditions and circumstances under which it must be transacted. And, as I have said, in my judgment, competition between the termini of a long haul is the most obvious and effective circumstance that justifies a railway in making a rate below what it might reasonably, and does, charge where there is no competition. The places between which competition in transportation exists between water craft and railways, or even the latter, always will and must send and receive freight at lower rates than others not so favored. This is the result of natural advantage, supplemented often by exceptional sagacity and enterprise, and it would be folly in the legislature to prevent it if it could.

As long as people and places differ so widely in capabilities and facilities, social or business equality is impossible. Society can do no more than to give each one an even chance and a fair show to make the most of his or its opportunities, and leave the result to circumstances over which it has little, if any, direct control.

The third question propounded by the receiver is easily answered.

Section 2 of the act, by prohibiting any carrier subject thereto from charging any one person "a greater or less compensation for any service" rendered in the transportation of persons or property subject to the act, than it does any other person for "a like and contemporary source," "under substantially similar circumstances and conditions," in effect prohibits the issuing of passes or the carrying of any person free of charge, so long as the same privilege is denied to any other person "under substantially similar circumces and conditions." Now it may be said, and with much plausi-

bility, that the wife or minor child of an employee sustains a different relation to the employer than that of the public generally; and that therefore the carriage of such a person on a pass or free of charge is a service rendered by the carriers under "substantially dissimilar circumstances and conditions" from that rendered to any other person not belonging to the family of an employee.

But sec. 22 of the act contains some specific exceptions to the operation of sec. 2. Among them is this: "Nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees."

The language of the exception is explicit. There is no room for interpretation or construction. The words cannot be made to include the "family of an employee," without violence to the apparent purpose of the legislature. In effect the exception declares that the "circumstance" of a person being the employee of a railway corporation is sufficient to justify the latter in carrying him free of charge, but not his wife and children. The exception takes the subject of free carriage on account of any person's employment by a railway corporation, out of the question of "similar circumstances and conditions," as provided in sec. 2, and declares that the person so employed may be carried on that account without reference to any other circumstance or condition, and, by a necessary implication, no one else.

Doubtless it would be expedient to include the immediate family—the wife and minor children—of the employee in this exception. By this means the corporation might, without material cost to itself or prejudice or injustice to any one, augment in a graceful way the compensation and convenience of faithful servants.

But the remedy, if any, is with Congress and not the courts.

The receiver is instructed that he is authorized to make a less rate for a long haul than a short one in conjunction with connecting lines or otherwise, whenever, by reason of competition with other lines or means of transportation, the same is necessary to enable the O. & C. road to retain or acquire business; and that he is not authorized to give passes over his road to any member of the family of an employee thereof, for the purpose of or in connection with interstate travel.

Legal Status of Railway Companies.—What the law in relation to the constitution of railway companies is, and what obligations are thereby imposed upon them, was very accurately summed up by Mr. Justice Harlan, in "The Civil Rights Cases," 109 U. S. 37, as follows: "In New Jersey Steam Navigation Co. *v.* Merchants' Bank, 6 How. 344, this court, speaking by Mr. Justice Nelson, said that a common carrier is in the exercise of a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself without the assent of the parties concerned."

To the same effect is Munn *v.* Illinois, 94 U. S. 113. In Olcott *v.* Supervisors, 16 Wall. 678, it was ruled that railroads are public highways, established by authority of the State for the public use; that they are none the less public highways, because controlled and owned by private corporations; that it is a part of the function of government to make and maintain highways for the convenience of the public; that, no matter who is the agent, or what is the agency, the function performed is that of the state; that, although the owners may be private companies, they may be compelled to permit the public to use these works in the manner in which they can be used. . . . So in township of Queensbury *v.* Culver, 19 Wall. 83, it was said that a municipal subscription of railroad stock was in aid of the construction and maintenance of a public highway, and for the promotion of a public use. Again, in Township of Pine Grove *v.* Talcott, 19 Wall. 666: "Though the corporation [railroad] was private, its work was public, as much so as if it were to be constructed by the State." To the like effect are numerous adjucations in this and the state courts with which the profession is familiar. The supreme judicial court of Massachusetts, in Inhabitants of Worcester *v.* The Western R. Corporation, 4 Met. 564, said in reference to a railroad: "The establishment of that great thoroughfare is regarded as a public work, established by public authority, intended for the public use and benefit, the use of which is secured to the whole community, and constitutes, therefore, like a canal, turnpike, or highway, a public easement. . . . It is true that the real and personal property, necessary to the establishment and management of the railroad, is vested in the corporation; but it is in trust for the public." In Erie, etc., R. Co. *v.* Casey, 26 Penn. St. 287, the court, referring to an act repealing the charter of a railroad, and under which the State took possession of the road, said: "It is a public highway solemnly devoted to public use. When the lands were taken it was for such use, or they could not have been taken at all. . . . Railroads established upon land taken by the right of eminent domain by anthority of the commonwealth, created by her laws as thoroughfares for commerce, are her highways. No corporation has property in them, though it may have franchises annexed to and exercisable within them." Whence it may be concluded, and these conclusions are sustained by authority, that (1) railways are quasi-public corporations, created for the purpose of conducting the business of common carriers of passengers and property upon their lines of railway, and for no other purpose. (2) As such they are engaged in a public service. Hannibal *v.* Swift, 12 Wall. 270; Messenger *v.* Penn. Co., 8 Vroom, 531; Chicago *v.* People, 56 Ill. 380; Coygo *v.* Barnard, Ld. Raym. 909; McDuffee *v.* Railroad, 52 N. H. 447; Baxendale *v.* G. W. R. Co., 5 Scott (N. S.), 336; Sanford *v.* R. Co., 12 Harris (Pa.); Munn *v.* Illinois, 4 Otto, 130; Chicago *v.* Iowa, 4 Otto, 161; G. W. R. Co. *v.* Burns, 60 Ill. 284; Garton *v.* Bristol, Best & Smith, 162; Peoria Co. *v.* Coal Co., 68 Ill. 489.

Can Courts Compel a Railway Company to Afford Facilities to Shippers?—The authorities upon this point answer this question affirmatively most fully. By mandamus (Dillon on Munic. Corp. 293), or when that remedy does not afford ample protection, by an injunction out of chancery, which always affords its assistance in aid of a common-law right. In Chicago v. Smith, 62 Ill. 274, the court said: "The courts, while willing and ready to protect these corporations in all their rights, have uniformly asserted and seemed determined to maintain their obligations to the public. The principles of the common law and their charters accepted by them, and which clothed them with a portion of the sovereignty of the State, impose duties upon them to the public which they must discharge. They can be compelled by the mandates of the courts to a full performance of them, and parties seeking redress need not resort to the imperfect action at common law, but may apply for

the most effectual remedy by mandamus. Railways are improved public highways. This court has decided that such corporations are created for the public good, to increase the facilities and conveniences and promote the great ends of commerce; and that they cannot organize monopolies and make contracts injurious to the public interests."

A. A mandamus has been allowed against a railway company in the following cases:—

1. To compel it to operate a railway on a bridge on a continuous portion of its main line, and to desist from using "transfer trains" across it. U. S. *v.* U. P. R. Co., 4 Dillon, 473; affirmed, 1 Otto, 343.

2. To compel it to use a train to transport passengers to a particular point. State *v.* Hartford, 29 Conn. 538; Rex *v.* Severn, 2 Barn. & Ald. 646.

3. To compel it to take tax receipts in payment for its charges. Mobile *v.* Wisdom, 5 Heiskell, 125.

4. To construct and grade its embankments so as not to interfere with the convenient use of the streets of the public. Indianapolis *v.* State, 37 Ind. 489.

5. To restore a portion of its track which it had removed. Rex *v.* Severn, *supra.*

6. To construct fences and cattle-guards. People *v.* Rochester, 14 Hun. 371.

7. To build a bridge, and keep it in repair. People *v.* Troy, 37 How. Pr. Rep. 427.

8. To deliver grain in bulk to a particular elevator. Chicago *v.* People, 56 Ill. 365.

9. To transport oil in tank cars. People v. New York, MS.

10. To carry cedar logs, though the company had never before carried the same. Rutherford *v.* Grand Trunk, 20 Lower Canada Jurist, 11.

11. To receive and transport freight upon such terms as are reasonable and usual, and to perform its duties as a common carrier. People *v.* N. Y. Co., 28 Hun, 545.

These cases clearly show that the common law affords a remedy, independent of statute power, to compel a railway company to transport passengers and freight—not in accordance with what it understands to be its duty, but in accordance with the necessities and requirements of the public.

B. Where the act threatened has not yet been performed, and where, when performed, the injury resulting therefrom will be permanent and perpetual—when the remedy at law would be inadequate or require a multiplicity of suits, and especially where the defendant is a corporation, a court of equity has power to stay the threatened act by injunction. Corning *v.* Troy R. Co. 40 N. Y. 191; Boston *v.* Boston, 16 Pick. 525; Gardner v. Newburgh, 2 Johns. Ch. 162; Belknap *v.* Belknap, Id. 473; Sanford *v.* R. Co., 12 Harris, 380; McDuffee *v.* Railroad, 52 N. H. 451; Agar *v.* Regents Co., Cooper, 221; 19 Vesey, 379; River Co. *v.* North Co., 1 Rail. Cas. 135. Having thus the right to retain the bill for an injunction, it has also the right to retain the suit for all purposes of relief—without remitting the complainant to his remedy at common law. In other words, jurisdiction having once rightfully attached, it will be made effectual for the purposes of complete relief. 1 Story Eq. Sec., 64 k; Taylor *v.* Merchants Co., 9 How. 390; Rathbone *v.* Warren, 10 Johns. 587; McCalmont *v.* Lawrence, 1 Blatch. 232; Foster *v.* Swazey, 2 W. & M. 217; Perkins *v.* Washington, 4 Cow. 645; Stevens *v.* Gladding, 17 How. 447; Miller *v.* McCan, 7 Paige, 451; Frost *v.* Myrick, 1 Barb. 362; High on Injunctions, p. 23, sec. 1. In the exercise of this power, equity affords as complete a remedy in aid of the common-law right as the common law itself could have afforded, and compels by mandatory injunction the permanent or continuous performance of affirmative acts, and it does this notwithstanding there might be a right to a mandamus. City *v.* Mayor, 1 Hughes, 90. Therefore, in suits against railway companies, equity has by such injunction compelled the performance of the following acts:—

1. To pull down a wall which it had unlawfully erected. G. N. R. Co. *v.* Clarence R. Co., 1 Coll. 507.

2. To stop all its trains at a certain station. Earl *v.* G. N. R. Co., 10 Hare, 664.*

3. To restore a stream of water to its natural channel. Corning *v.* Troy R. Co., 40 N. Y. 191.

4. To erect an archway on the plaintiff's premises. Storer *v.* G. W. Co., 2 Y. & C. 48.*

5. To make a carriage-road and maintain a wharf. Wilson *v.* Furness Co., L. R. 9 Eq. 28.*

6. To make necessary slips and roadways for cattle. Sanderson *v.* Cockermouth Co., 11 Beav. 497.*

7. To permit the plaintiff to run its cars in such manner as will be necessary for the safe and speedy conveyance of passengers and goods along the defendant's railway, and to furnish the plaintiff "all such other conveniences as the plaintiff had been accustomed to use." G. N. Co. *v.* Manch Co., 5 DeG. & S. 138.*

8. To construct and maintain a permanent siding. Greene *v.* West. C. Co., L. R. 13 Eq. 44.*

9. To construct and maintain at a specific point a first-class railway station, and to supply it with the necessary rooms and conveniences to be determined by the court at chambers, and to stop every passenger train thereat to set down and take up, and, therefore, to transport passengers. Hood *v.* N. E. Co., L. R. 8 Eq. 666, on appeal 5 Ch. App. 525;* Commonwealth *v.* Eastern, 103 Mass. 259.

10. To carry coals for the plaintiff on equal terms with others. Harris *v.* Cockermouth Co., 3 C. B. N. S. 693.

11. To admit the omnibus of the plaintiff, an express carrier, into the yard of the railway station for the purpose of receiving, forwarding, and delivering traffic over and upon their said railway, in the same manner and to the same extent as the railway vehicles. Mariott *v.* London Co., 1 C. B. N. S. 498.

12. To deliver grain in bulk, without charging the plaintiff five dollars per car for so doing. Vincent *v.* C. & A. R. Co., 49 Ill. 37.

13. To control the manner in which one railroad shall cross another, and to apportion the expense of the crossing between them. Chicago *v.* Chicago, 6 Bissell, 219.

14. To deliver cattle at the plaintiff's stock-yard. McCoy *v.* Railroad, 22 Am. Law Reg. N. S. 725.

These authorities show that equity has the power and that it is its duty, as was said by Lord Cottonham, to "adapt its practice and course of proceeding, as far as possible, to the existing state of society, and to apply its jurisdiction to all those new cases which, from the progress daily making in the affairs of men, must continually arise, and not, from too strict an adherence to forms and rules established under very different circumstances, decline to administer justice and to enforce rights for which there is no other remedy." 2 Red. on Rail. § 205; Taylor *v.* Salmon, 4 My. & Cr. 141; Mare *v.* Malachy, 1 Id. 459; Walworth *v.* Holt, 4 Id. 619, 635.

Railway Charges must be Reasonable.—Whatever may be the name under which compensation is demanded, it is absolutely essential to the enforcement of its payment, either by suit or by withholding such facilities, that it should be reasonable. This is the rule of the common law. 4 Otto, 13 .

The rights and liabilities of common carriers underlie the charters of all

* The decision in this case is not based upon a statute.

railway companies, and restrict any general grants therein contained. Any general language, therefore, which may be found in the charters of the defendants is subject to this limitation. Chicago *v.* People, 56 Ill. 365, 383. Even the power to exact tolls. Id., 67 Ill. 11; Camblos *v.* P. & R. R. Co., 4 Brewster, 563, 599, or other compensation. The common law requires that the charters shall be interpreted as authorizing a reasonable compensation only, and as preventing unjust discrimination. 13 Am. Law Reg. N. S. 189; Winona *v.* Blake, 4 Otto, 180; Olcott *v.* Banfill, 4 N. H. 537, 546; Story on Bailments, § 508; Holford *v.* Adams, 2 Duer. 480; Crouch *v.* G. N. Co., 11 Ex. 752; New England Co. *v.* Maine, 57 Me. 188, 194; Vincent *v.* Chicago, 49 Ill. 33, 43; 19 Am. Law Reg. O. S. 593; 2 Redfield on Railways, 95; Pickford *v.* Grand Co., 10 M. & W. 399, 422, 424; Harris *v.* Packwood, 3 Taunt. 264; 9 Am. Law Reg. N. S. 728; Browne's Law of Carriers, 82; Sanford *v.* Catawissa, 24 Pa. St. 378, 381; McDuffee *v.* Railroad Co., 52 N. H. 430; Shippen *v.* Pennsylvania R. Co., 47 Pa. St. 338, 340; Messenger *v.* Pennsylvania R. Co., 36 N. J. Law Reps. 407, 412; Lord Hale, De Partibus Maris, 1 Harg. Law Tracts, 78; Bolt *v.* Stennett, 8 Term Rep. 606; Allnut *v.* Inglis, 12 East, 527; Munn *v.* Illinois, 4 Otto, 113, 126; Camden *v.* Briggs, 22 N. J. Law Reps. 647; Barrett *v.* Darlington, 2 M. & G. 134; S. C. 7 M. & G. 870; Gildart *v.* Gladstone, 11 East, 575; Proprietors *v.* Hustler, 1 B. & C. 424.

The power to demand any toll or compensation at all, implying, as it does, a tax upon the subject, is a sovereign prerogative or franchise, which is granted to an individual subject solely by reason of the greater ease or accommodation which is afforded under the grant, to all the subjects at large, and who are thereby recompensed for the payment of the tax. Messenger *v.* Pennsylvania Co. 36 N. J. Law Reps. 407, 412; 1 Harg. Law Tracts, 6; Green's Brice's *Ultra Vires*, 278; Camden *v.* Briggs, 2 Zabriskie, 623, 626; Perrine *v.* Chesapeake, 9 How. 172; Rowe *v.* Shelsom, 1 N. & M. 740.

"Toll" was first defined in cases relating to fairs and markets, and by Lord Coke, as follows: "Toll to the faire or market is a reasonable summe of money due to the owner of the faire or market upon things tollable within the faire or market, as for stallage, picage, or the like." Coke, 2d Inst. 220.

The right to demand it was then extended to towns, under the name of "murage," which was defined to be "A reasonable toll to be taken of every cart, wagne, horse laden comming to that towne, for the inclosing of that towne with walls of defence." Coke, 2d Inst. 222.

Being a matter of private benefit to the owner of the fair or market, it could not be exacted unless specifically granted, or supported by a custom or prescription of sufficient duration to imply a grant. Cro. Eliz. 558; 2 Lutw. 1336; 2 Inst. 220; Anonymous, 7 Mod. 12; Holloway *v.* Smith, 2 Strange, 1171; Bacon's Abr., tits. "Fair," "Market," "Toll"; Mayor *v.* Ward, 1 Wilson, 107, 114, 115; Olcott *v.* Banfill, 4 N. H. 537, 544; Perrine *v.* Chesapeake, 9 How. 172, 184; Warrington *v.* Mosely, 4 Modern, 319, 323.

The right of the Crown to grant a toll was, however, limited by the common-law rule that it should be reasonable; and it is believed that this limitation would control, even if the unreasonable toll should apparently be sanctioned by charter authority.

Coke says: "If the king grant to a man a faire or market and grant no toll, the patentee shall have no toll, . . . for such a faire or market is accounted a free faire or market. . . . Lastly, it was there [Case of Northampton, Mich., 39 & 40 Eliz. Car. Reg.] resolved that, if the toll granted with the faire or market be outrageous or unreasonable, the grant of the toll is void, and that the same is a free market or faire." 2d Inst. 220.

So also it was said: "Also, if the king, at the time he grants a fair or

market, grants a toll, and the same is outrageous and excessive, the grant of the toll is void, and the same becomes a free fair or market. 2 Inst. 220; 2 Lutw. 1336; Bacon's Abridg. "Fairs and Markets," "Toll."

In the case of the Corporation of Stamford *v.* Pawlet, 1 Cromp. & J. 57, affirmed in Exchequer Chamber, 400, the court said: "We think that where a grant of tolls is found in a charter, the word ought to have some meaning, and the charter some operation, and that it can receive operation only by being construed to mean a reasonable toll. We think that no one case has ever been determined against this construction. . . . The king cannot grant an unreasonable toll, and it is competent to every subject of the realm from whom the toll is demanded to question its being reasonable, even when the exact sum is specified in the charter. This question may always be brought under discussion in whatever terms the grant may be expressed."

It is believed that, when a proper case arises, it will be held by the courts of this country that this limitation imposed by the common law of England upon the Crown limits also the power of the legislature, and that the latter has no power to impose an unreasonable toll. How this conclusion can properly be reached, it is not now necessary to determine, but as no railway can be constructed without the exercise of the power of eminent domain, and such power can be lawfully exercised in favor of a public use only, which must be a *bona-fide* and not a pretended one—West River Bridge Co. *v.* Dix, 6 How. 507—the courts would probably find under this rule the power to interfere, whenever it appeared that the excessive toll reduced the use to a private use. Indeed, the authorities already existing are decisive in favor of the power of the courts to interpose, whenever it is claimed that the exercise of the right of eminent domain will not subserve public purposes, or be of public utility. Field on Corporations, p. 480, and Note 2. If the courts have the power to prevent the construction of a railway, upon the ground that the alleged subsequent benefit to the public is illusory, it would seem that, upon the same principle, they have a right to interfere, whenever by any act such road is sought to be withdrawn from the public user, and dedicated solely to private use. That this power exists somewhere in the courts is very clearly indicated in Bonaparte *v.* The Camden & Amboy R. Co., 1 Baldwin, 223, and is also affirmed in very vigorous language by Mr. Justice Miller, in Loan Association *v.* Topeka, 20 Wall. 655, as follows: "To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and called taxation. This is not legislation. It is a decree under legislative forms."

The word "tolls," as originally applied to railroads, had a different signification from that which now attaches to it. The purpose of a railway, as originally understood, was to afford a roadway or roadbed simply, leaving the public to furnish motive power and vehicles thereon; and for such use the companies were authorized to make a charge, which was denominated a "toll." Rex *v.* Severn, 2 B. & Ald. 646. The companies were subsequently authorized to act as transportation companies, or carriers, also, and to charge a toll for both kinds of service. Reg. *v.* Grand Junction Co., 4 A. & El. 16; Boyle *v.* Philadelphia Co., 54 Pa. St. 312. Finally, the legislatures made the right to use the motive power and vehicles exclusive in the railways, and imposed upon them the duty of transporting passengers and freight, and prescribed rates of compensation therefor, which rates were called "tolls." Boyle *v.* Philadelphia, *supra;* Charters of the Louisville & Frankfort and Lexington & Frankfort railway companies, Laws of Kentucky, 1850, Dec. 21, chap. 121. These latter charges specify the rate per ton per mile which

may be charged by the company for the transportation of goods, wares, and merchandise. Other charters provide that the rates must be reasonable.

The question of the reasonableness of such charge or toll is purely a question of law, and as such is to be decided by the courts whenever a case presenting all the facts is brought before them for judicial investigation.

The statute of 1 Westminster, cap. 31, A.D. 1275, which has been said "to make outrageous toll contrary to the law of the land" (1 Cr. & Jr. 66) enacted as follows: "Touching them that take outrageous toll contrary to the common custom of the realm in market towns, it is provided that, if any do so in the king's town, which is set in fee farm, the king shall seize into his own hand the franchise of the market; and, if it be another's town, and the same be done by the lord of the town, the king shall do the like; and if it be done by a bailiff or any mean officer, without the commandment of his lord, he shall restore to the plaintiff as much more for the outrageous taking as he had of him if he had carried away his toll, and shall have forty days' imprisonment. Touching citizens and burgesses to whom the king or his father hath granted murage to enclose their towns, which take such murage otherwise than it was granted unto them and thereof be attainted, it is provided that they shall lose their grant forever, and shall go grievously amerced unto the king."

Speaking of this statute, Coke said: "And presently after the making of this act, the effect thereof for justices in eire to inquire of it was inserted in the chapters or articles of the eire in these words: *Item, de hiis qui ceperunt superflua vel indebita tolneta in civitatibus burgis, vel alibi contra communem usum regni*" (Coke, 2d Inst. 223). "But at this day there is not one certaine toll to the market taken, but if that which is taken be not reasonable, it is punishable by this statute, and what shall be deemed in law to be reasonable shall be judged, all circumstances considered, by the judges of the law, if it comes judicially before them" (Coke, 2d Inst. 222).

This statement of the power of the courts to determine the reasonableness of any given charge by one "in the exercise of a public office," has been cited with approval by all the early commentators, and will be found in Bacon's Abridgment, Comyn's Digest, and Jacob, under the word "toll."

The existence of this power in the courts has also been repeatedly affirmed in many reported cases, which confirmed the affirmation by exercising the power.

In Gard *v.* Callard, 6 M. & S. 70, the court said, when speaking of the toll involved, that "the question whether reasonable or not was a question for the court, and not for the jury."

On a motion for a new trial, the court adopted as its own ruling the language of Coke, that "what shall be deemed in law to be reasonable shall be judged, all circumstances considered, by the judges of the law, if it comes judicially before them."

In Lowden *v.* Heirons, 2 Moore, 102, 113, the court said: "The specific sums to be demanded for tolls are not expressed in the charter. The tolls, therefore, which have been received subsequent to the grant, are merely presumptive. Neither have they been uniform. The jury should have given their verdict according to the invariable or uniform custom. The judge could alone decide whether such tolls were or were not reasonable." See also Wright *v.* Bruister, 4 Barn. & Ad. 115; Piddington *v.* S. E. Co., 5 C. B. N. S. 111–121.

In the latter case the court said: "I think the company were wholly unjustified in doubling the charge in this way. It is clear upon the whole facts of the case that the increased charge is made for the purpose of preventing people who are likely to send packages of the description in question, viz., carriers, from entering into competition with the company in the

conveyance of goods—a thing which it has over and over again been decided that these companies cannot be permitted to do."

In Baxendale *v.* G. W. R. Co., 5 C. B. N. S. 330, 351, the court said: "Such being plainly the the intention of the legislature, and this court having been constituted the tribunal by which any injustice or inequality in the working of the railway system as between the companies and the public is to be redressed, we must endeavor to prevent any injustice, either in the rate of charge or the degree of accommodation afforded."

In Attorney-General *v.* Railroad Co., 35 Wis. 426, where the charter contained "a franchise to take such toll as the company should think reasonable" (p. 586), the court (p. 588) said: "We are of the opinion that the franchise is not one vesting in the corporation an absolute right of exacting whatever tolls it might see fit. The courts have authority to limit the right to reasonable tolls—to tolls reasonable, not in the arbitrary judgment of the corporation but in fact. This is, indeed, as against a great railroad company, not a very effective remedy. But the law gives the remedy to all aggrieved by the exaction of unreasonable tolls. . . . And (p. 589) the restraint of a franchise to take reasonable tolls to tolls reasonable in fact, is a judicial, not legislative, function."

In Munn *v.* Illinois, 4 Otto, 113, 133, the court said: "So, too, in matters which do affect the public interest, and as to which legislative control may be exercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable."

This was reaffirmed in Peik *v.* Chicago, 4 Otto, 164, 178, and in Chicago *v.* Iowa, 4 Otto, 155, 161.

Force in America of English Decisions as to the English Railway and Canal Traffic Act.—The rule, as stated by the United States supreme court upon this subject, is, "that where English statutes, such, for instance, as the statute of frauds and the statute of limitations, have been adopted into our own legislation, the known and settled construction of those statutes, by courts of law, has been considered as silently incorporated into the acts, or has been received with all the weight of authority. McDonald *v.* Hovey, 110 U. S. 628.

In so far, then, as the Interstate Commerce Act's provisions are copies of the English statute regulating the same subject, the English decisions are to be considered as adopted for the guidance of the American courts, in so far as they construe provisions common to both statutes.

Equal Rates under Some of the English Decisions.—In Baxendale *v.* E. C. R., 4 C. B. N. S., 93, E. C. L. 78, 79, decided February 11, 1858, Byles, J., said: "I know of no common-law reason why a carrier may not charge less than what is reasonable to one person, or even carry for him free of all charge."

In Branley *v.* S. E. R. Co., 12 C. B. N. S., 104, E. C. L. 74, 75, decided May 12, 1862, Willes, J., said that the obligation of a carrier at common law is "to charge reasonably, but not to charge equally." See also the case of G. W. R. Co. *v.* Sutton, L. R. 4th, H. L. (English and Irish Appeals), July 13, 1869. But these dicta are not sustained by the weight of authority.

Object of the English Statutes Regulating Railways.—The sole object of the statutes was to prevent railway companies from "prejudicing and favoring particular parties," and to require them to charge "equally to all persons" where the service was rendered "under the same circumstances." This appears from the language of many of the cases.

In Parker *v.* G. W. R. Co., 13 Eng. R. & C. Cas. 599, Tindal, C. J., said: "From these several enactments it appears clearly to have been the intention of the legislature that parties incorporated should be empowered

to construct the railway, and hold it as their property, and derive certain profits from it, but that every member of the community should have an equal right to use it on the terms prescribed by the act; and that the payment to be made for such user, whether under the denomination of rates or tolls, or charges fixed by the company, should be reasonable and equal to all persons, without reference to the particular advantage derived by any individual, or class of individuals, from such user."

In The Attorney-General *v.* B. & D. J. R. Co., 2 Eng. R. & C. Cas. 132, 133, the Lord Chancellor said that the object of the legislature was to prevent "those who should get the monopoly of the carriage of the public from exercising that monopoly to the prejudice of individuals; that is to say, they shall not be at liberty to carry the goods of one manufacturer and refuse the goods of another. It was to give an equal right to the public to the convenience and not to prevent the company from making such arrangements within the powers of their act as they might find most convenient to themselves." And see also Nicholson *et al. v.* G. W. R. Co., 1 Nev. & Mac. 148, 149; West *v.* L. & N. W. R. Co., 1 Nev. & Mac. 172; Ransome *v.* E. C. R. Co., 1 Nev. & Mac. 70.

"Fair Interests" of Railway Company.—This phrase refers to costs, expenses, and profits incidental to the traffic. See N. & L. Coal Co. *v.* Caledonian R. Co., 2 Nev. & Mac. 39; Bellsdyke Coal Co. *v.* N. B. R. Co., 2 Nev. & Mac. 110; Nicholson *v.* G. W. R. Co., 1 Nev. & Mac. 142; Greenop *v.* S. E. R. Co., 2 Nev. & Mac. 319; Ransome *v.* E. C. R. Co., 1 Nev. & Mac. 158; Oxlade *v.* N. E. R. Co., 1 Nev. & Mac. 94; Lees *v.* L. & Y. R. Co., 1 Nev. & Mac. 352.

Competition Justifies Lower Rates for a Long than for a Short Haul.—Transportation conducted between competitive points is not conducted under substantially similar circumstances and conditions with traffic conducted between points that are not competitive, and therefore that the fourth section of the act of Congress to regulate commerce does not apply. Many authorities sustain this proposition.

The Attorney-General *v.* B. & D. J. R. Co., 2 Eng. R. & C. Cas. 124, was decided August 8, 1840. The B. & D. J. R. act empowered that company to receive from passengers conveyed by the company's carriages tolls not exceeding a specified amount. By a subsequent act it was provided that the charges by the first act, authorized to be made for the carriage of passengers, goods, etc., "shall be at all times charged equally, and after the same rate per ton per mile, in respect of all passengers and goods of a like description, and conveyed or propelled by a like carriage or engine passing on the same portion of the line only, and under the same circumstances," etc.

The B. & D. J. R., commencing at Derby, intersected the L. & B. R. at Hampton-in-Arden. Afterwards the M. C. R. was built from Derby to an intersection with the L. & B. R. at Rugby. There were then two competitive routes from Derby to London, and the new route opened by the M. C. R. was the shortest. In order to meet that competition, the B. & D. J. R. Co. charged through passengers who were travelling between the competitive points—Derby and London—at the rate of two shillings between Derby and Hampton-in-Arden, while they charged local passengers who were only travelling between the non-competitive points—Derby and Hampton-in-Arden—at the rate of eight shillings between those points.

The attorney-general filed a bill against the B. D. & J. R. Co., charging that said company had fixed the aforesaid unequal charges, since the opening of the M. C. Ry., "in order to induce passengers, goods, and merchandise to be conveyed to Derby by way of their railway; and for that purpose have made a reduction in the charge for conveyance by them, in favor of persons

travelling upon the railway between Hampton-in-Arden and Derby, who are proceeding from or to London along the L. & B. Ry., and who would otherwise travel by the M. C. Ry., although such persons travel upon and use the railway between Hampton-in-Arden and Derby under the same circumstances with persons in favor of whom no such deduction is made."

The bill prayed "that it may be declared that the charges made by the B. D. & J. Co. for the carriage of passengers, goods, wares, and merchandise conveyed by the company, and passing on the line of the railway for the whole distance between Hampton-in-Arden and Derby by the same or like trains, propelled by the same or the like carriages, ought to be charged equally and after the same rate, whether such passengers, goods, merchandise, etc., proceed on, or are conveyed along the L. & B. Ry., for the whole distance from or to London or not, . . . and that the company be restrained from charging lower rates in respect of such passengers, goods, and merchandise as pass along the L. & B. Ry. for the whole distance between London and Hampton-in-Arden, than the rates charged by said company, in respect of such passengers, goods, and merchandise as do not pass along the B. D. & J. Ry. at all, or so pass for a distance short of the whole distance between London and Hampton-in-Arden."

The lord chancellor dismissed the motion with costs, saying: "It is not denied that they (the company) carry those who are going (from Derby) to Hampton-in-Arden at the charge which they are authorized to make, but persons travelling under other circumstances, not intending to stop there, but going to London, are, according to the attorney-general's complaint, charged two shillings instead of eight shillings. Now, I do not know who will suffer by that arrangement, whatever may be the cause of it. . . . The attorney-general now asks me to interfere to prevent the company carrying passengers (between competitive points) at too low a rate. . . . It is not necessary to say anything about the jurisdiction of the court, or how far I should interfere if I had the power, because I am quite clear that the sixty-third section has not the slightest reference to this case."

The sixty-third section required that all passengers, etc., should be charged equally, etc., passing on the same portion of the line, etc., "and under the same circumstances," and his lordship held that said section had no reference to the case before him, because persons travelling between competitive points were not travelling "under the same circumstances" as local passengers travelling between non-competitive points, notwithstanding both classes of passengers travelled over the same portion of the railway, propelled by the same engines, and in the same cars.

The English Railway and Canal Traffic Act of 1854 provided that no railway company "shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person, . . . nor subject any person "to any undue or unreasonable prejudice or disadvantage in any respect whatever." 1 Nev. & Mac. 2.

Hozier filed a petition against the Caledonian R. Co., alleging that he was aggrieved by being charged nine shillings sixpence for travelling between Motherwell and Edinburgh, a distance of forty three miles, while passengers travelling in the same train, and in the same class of carriage, between Glasgow and Edinburgh, a distance of fifty-nine miles, were charged only two shillings. 1 Nev. & Mac. 28.

It was alleged by the defendant the petitioner was a large stockholder in a rival railway, which competed with the defendant between Glasgow and Edinburgh, and that the real object of his petition was to put a stop to the competition of defendant between those points. I Nev. & Mac. 28.

The petition was dismissed January 20, 1855.

Lord Curriehill said: "The only case stated in the petition is that pas-

sengers passing from Glasgow to Edinburgh, or from Edinburgh to Glasgow, are carried at a cheaper rate (aggregate) than passengers from Motherwell to either of these places. Now, that is an advantage, no doubt, to those passengers travelling between Edinburgh and Glasgow. But is it an unfair advantage over other passengers travelling between intermediate stations? The complainer must satisfy us that there is something unfair or unreasonable in what he complains of, in order to warrant any interference. Now I have read the statement in the petition, and I hade listened to the argument in support of it, to find what is unreasonable in giving that advantage to through passengers. What disadvantage do Motherwell passengers suffer by this? I think that no answer was given to this, except that there was none." Hozier *v.* Caledonian R. Co., I Nev. & Mac. 31, 32.

This case also certainly decides that to charge local passengers a greater compensation in the aggregate for a shorter distance than is charged through passengers for a longer distance between competitive points, does not subject the local passengers "to any undue or unreasonable prejudice or disadvantage in any respect whatever," notwithstanding the passengers, through as well as local, may travel over the same line, in the same direction, in the same trains, and in the same class of carriages.

In Jones *v.* E. C. R. Co., 1 Nev. & Mac. 45, it appeared that defendant charged 45 pounds per year for season tickets from Colchester to London, a distance of twenty miles, while it charged for such tickets only 20 pounds per year from Harwich to London, a distance of over seventy miles. It was insisted that this was an undue preference of the inhabitants of Harwich over those of Colchester.

The court (on January 27, 1858) refused the rule. Williams, J, said: "For anything that appears, there may be very good reasons for making such difference in the price. . . . At this moment there is active competition at Reading between the Great Western and Southwestern railways; the consequence is, that considerably less is charged for tickets from that place to London, and *vice versa*, than for intermediate stations. There is no such reason for the difference here, for there is but one line to Harwich, and consequently no competition."

This case also decides that to charge local passengers a greater compensation in the aggregate for a shorter distance than is charged through passengers for a longer distance between competitive points, does not subject the local passengers "to any undue or unreasonable prejudice in any respect whatever," notwithstanding the passengers, through as well as local, may travel over the same line, in the same trains, and in the same direction.

It further decides that the fact that active competition exists at the points between which the through passengers are carried affords "a very good reasons for making a difference" between the rates charged such through passengers, and the rates charged local passengers at points where no competition exists. 1 Nev. & Mac. 46.

If competition affords a good reason for making a difference between through and local rates, it cannot be maintained that the transportation of local passengers is done "under substantially similar circumstances and conditions" with the transportation of through passengers, when competition forces the company to make the lower through rate.

The case of Napier *v.* G. & S. W. R. Co., 1 Nev. & Mac. 292, was decided June 19, 1859. The defendant operated a railway from Glasgow to Ardrossan, on the sea-coast, and endeavored to build up a trade between Glasgow and Belfast, *via* Ardrossan, in competition with certain steam vessels which carried direct from Glasgow to Belfast without any transshipment whatever. With a view to foster and encourage this competitive through trade between Glasgow and Belfast, the defendant made an arrangement

with the owner of a vessel called the Oscar, by which the Oscar was to ply between Ardrossan and Belfast in connection with defendant's trains. Through tickets and through bills of lading were issued between Glasgow and Belfast, *via* Ardrossan, and the through rates were divided between the defendant and the owner of the Oscar in certain proportions, the defendant's proportion of the through rate, covering the distance from Glasgow to Ardrossan, being much less than the local rates charged by the defendant between those points. In fact, said local rates were in some instances much higher than the entire through rates. The plaintiff was the owner of a vessel called the Lancefield, which also plied between Ardrossan and Belfast, and he complained that the defendant refused to sell through tickets or issue through bills of lading by his vessel, and refused to prorate with him on through rates. On the contrary, the defendant charged its full local rates between Glasgow and Ardrossan on all freights and passengers carried by the plaintiff's vessel between Androssan and Belfast, and the plaintiff prayed that the defendant be required to make the same arrangement with him that existed with the owner of the Oscar, or that defendant be restrained from continuing the arrangement with the latter.

The court refused the relief sought principally upon the ground that the English Railway and Canal Traffic Act of 1854 did not apply to deep-sea traffic; but aside from that consideration, the court held that the plaintiff had no case at all.

It was impossible for the defendant to build up a competitive business between Glasgow and Belfast unless it could make some reliable and permanent arrangement for the sea transfer between Ardrossan and Belfast, and to make such an arrangement special inducements had to be offered to the owner of some vessel, as there was not traffic enough for more than one vessel. If plaintiff had the right to demand that the same facilities be afforded him as were afforded to the Oscar, the owners of all other vessels would have a similar right; and if they all had that right, the transfer business would be divided among so many vessels that it would not be profitable to any of them, and none of them could be relied upon to continue in it. In order to preserve to the public the benefit of the competition afforded by defendant's route between Glasgow and Ardrossan it was absolutely necessary to refuse the plaintiff's application, though the inevitable consequence was to compel the plaintiff or his customers to pay local rates between Glasgow and Ardrossan, which, as before stated, were in all instances higher than defendant's proportion of the through rate covering the distance between those points; and in some instances much higher than the entire through rate from Glasgow to Belfast.

In the case of E. & W. J. R. Co. *v.* G. W. R. Co., 1 Nev. & Mac. 346, decided May 12, 1874, the English railway commissioners use this language: "There can be little doubt that through rates generally are a convenience to the public, and that the public are interested in having a through rate for this particular traffic. But it must not be overlooked that through rates are in amount greatly below the sum of the local rates, and rest upon the supposition that the traffic to which they apply is worked as economically as possible."

The case of Foreman *v.* G. E. R. Co., 2 Nev. & Mac. 202, was decided in July, 1875. The following facts are extracted from the opinion of the English commissioners: "The applicants in this case are coal merchants at Great Yarmouth, and complain that the coal rates of the Great Eastern Co. to various places on their lines, as, for example, to Norwich, are very much higher in proportion to distance from Yarmouth than from Petersborough. The coal the applicants deal in is brought to Yarmouth by sea, and is thence sent inland by rail; but being an expensive coal, the railway is used only to

carry it to places near. To these places coal is also brought from Peterborough, and this coal competes successfully with sea-borne coal, and its ability in this respect is attributed by the complainants to the practice of the railway company in their opposition to their (complainant's) carriage of coal by ship, and their (the company's) efforts to attract them to themselves, of charging much less in proportion for long distances than for short ones." 2 Nev. & Mac. 204, 205.

The commissioners, after examining the scale of rates charged by the company, said that "as to their comparative amounts for the different mileages, it does not appear that there is a greater disproportion in relation to distance in these charges than in the cost of carriage to the company, and if the principle on which the scale is graduated is a fair consideration of the cost to the company of carrying coal for the different distances, it is not a valid objection to the scale that it is better adapted to the business of some merchants than of others, and that its low rates for long distances are useless to those who deal in over-sea coal: nor does the traffic act prevent a railway company from having special rates of charge to a terminus to which traffic can be carried by other routes or other modes of carriage with which theirs is in competition." 2 Nev. & Mac. 205, 206.

The case of W. &. B. Canal Co. *et al. v.* B. Canal Co., 3 Nev. & Mac. 113, was decided in November, 1877. The applicants and defendants were severally proprietors of canals, which formed links in a continuous chain of inland navigation between South Staffordshire and the river Severn on the one hand and London and the river Thames on the other.

The applicants were the proprietors of two of said canals, and they alleged that the several canals formed valuable routes in the interest of the public for traffic between those extreme points, and also between intermediate places, and that in order to enable the canals as routes to compete with the railway system it was necessary that there should be through rates for traffic passing through said canals, and as the sum of the local rates charged on the several canals was too high to allow of competition with the railways, the applicants asked the commissioners, under the English Act for the regulation of railways passed in 1873, to fix through rates for the canal traffic, which, of course, were to be less than the sum of the canal local rates.

In the case cited one of the defendants, the Birmingham Canal Co., objected to the application upon the ground that as its proportion of the through rates would be less than its local rates, and as its special act contained what is known in England as the "equality clause," the acceptance of its proportion of the through rates would compel it to reduce its local rates to correspond. But the commissioners replied, that the restriction contained in defendant's special act against varying rates did not apply to through rates which the commissioners were authorized to establish under the General Act of 1873; at least that the restriction did not extend to preventing differences between the through rates fixed by the commissioners under the act of 1873 and the ordinary, or local, rates which the company could take under its special act."

And, in stating a case for a superior court, the commissioners said: "The portions allotted by us to the Birmingham Canal Co. out of the said through rates or tolls, allowed by our judgment, are in some cases lower than the rates or tolls which the Birmingham Canal Co. are entitled to charge, and are now charging, for local traffic carried over the same parts of their canals and navigations."

The case of Richardson *et al. v.* Midland R. Co., 4 Eng. R. & Canal Traffic Cases, 1 (Brown & Macnamara), was decided August 6, 1881.

The applicants were brewers and maltsters at Newark and complained that their traffic was unduly prejudiced by the defendant, by not being carried

on as favorable terms as to rates and in other respects as similar traffic at Burton.

Newark and Burton were both situated on defendant's railway, and defendant was in competition at both places with other railway carriers, and also with carriers by water; defendant's rates, "to and from both places, had been settled with reference to what it could obtain, having regard to other means of getting the traffic to its destination."

In discussing the difference between the rates which obtained from other points to Burton and Newark respectively, the commissioners said: "The difference, or part of it, may possibly be required by the route from the same district not being the same all the way to the two places, and by the separate portions of line passed over being more costly to work or construct, in the one case, than in the other; or again, it may be required by a competition for the conveyance of the particular traffic between the two termini, existing in the one case and not in the other."

The case of the Broughton, etc., Coal Co. *v.* G. W. Ry. Co., 4 Eng. Ry. and Canal Traffic Cases (Brown & Macnamara), 191, was decided February 14, 1883. The applicants were colliery owners in North Wales, and complained that the defendant charged them a higher mileage rate upon their coals than was charged by the defendant to the colliery owners in South Wales, though all of the collieries were shipping to the same market. One of the defences relied upon was that the South Wales coal was carried by the defendant in competition with the L. & N. W. Ry. Co., by rail, and also in competition with vessels by sea. The commissioners said: "In determining the question whether the lower mileage rate from South Wales is, or is not, an undue advantage to South Wales traffic, we must also take into account how the case stands as to either coal being able to be carried at a less cost to the company than the other, or as to the two coals being under different conditions as regards competition or other special circumstances."

The case of Strick *v.* Swansea Canal Co., 16 C. B. N. S. 111, E. C. L. 245, was decided April 25, 1864. A proviso in a canal act directed that the tolls of the canal company should be "charged equally to all persons, and after the same rate, whether per mile, or per ton per mile, in respect of all barges, etc., of the like description, passing along or using the same portion of the canal, and all goods, etc., of the like description, conveyed or propelled in a like boat, and passing along or using the same portion of the said canal, etc., under the like circumstances," etc. It was held "that it was competent to the company to agree to carry at a lower rate for a particular individual, in consideration of a large guaranteed minimum toll, in order to enable them (the company) to enter into competition with a rival line of railway."

It is true that the judges do not, in their opinion, lay any stress on the fact of competition, and place their justification of the company's rates upon the ground that the individual to whom lower tolls had been charged than those charged the plaintiff had guaranteed large quantities of goods, for long distances, in regular loads. But in the statement of the case, and in the argument of counsel, reference was made to the fact that at the place where the company received the traffic of the individual to whom the lower rates had been conceded, the canal company was in active competition with a certain railway company, whereas there was no competition whatever at the place where the plaintiff's goods were received. While, therefore, the effect of competition was not discussed in the opinions of the judges, they being unanimous in favor of the canal company on the other point, it is quite certain that the matter of competition was debated before the court; and the court would doubtless have said that competition could not be regarded in considering "the circumstances" under which the transportation

had been conducted, if the court had believed that such was the law of the case.

In the case of Ransome *v.* E. C. Ry. Co., 1 Nev. & Mac. 63, decided in 1857, though the court granted relief to Ransome & Co., they were careful to say that they did it without deciding that a railway company may not charge different rates "where the difference is for the purpose of competing with another line." 1 Nev. & Mac. 71.

And in Harris *v.* Cockermouth Ry. Co., 1 Nev. & Mac. 102-3, Chief Justice Cockburn said: "I quite agree that this court has intimated, if not absolutely decided, that a company is entitled to take into consideration any circumstances, either of a general or of a local character, in considering the rate of charge which they will impose upon any particular traffic. As, for instance, in respect to terminal traffic, there might be competition with another railway; and in respect to terminal traffic as distinguished from intermediate traffic, it might well be that they could afford to carry goods over the whole line cheaper, or proportionately so, than they could over an intermediate part of the line."

In the case of Ransome *v.* E. C. Ry. Co., 1 Nev. & Mac. 120, decided in 1858, Crowder, J., said: "There are many circumstances which may induce a railway company to charge, on parts of their line, rates which leave little or no remuneration, as the proximity of rivers, or canals, or other lines of railway, which may enter into competition with them and materially affect their interests."

A careful examination of the cases cited above in this section of my argument will leave no reasonable doubt but that the English courts and the English railway commissioners have never regarded traffic conducted between competitive points as conducted "under the same circumstances" as traffic conducted between points not competitive, and therefore, that to charge less for longer distances between competitive points, than for shorter distances between points not competitive, was never regarded as a violation of section 90 of the Railway Clauses, Consolidation Act of 1845.

The same authorities also establish the proposition that the forced concession of competitive rates between competitive points has never been regarded by the English courts or commissioners as an "undue or unreasonable preference or advantage to, or in favor of" shippers at those competitive points, nor an "undue or unreasonable prejudice or disadvantage to, or against" shippers at points not competitive, and therefore that the concessions by railway companies of such competitive rates to shippers at competitive points was never regarded as a violation of section 2 of the English Railway Act of 1854.

A Railway Company has No Right to Discriminate against an Individual on Account of his Occupation or Personal Status.—Section 90 of the Ry. Cl. Consol. Act, while it authorizes railway companies to vary their tolls "so as to accommodate them to the circumstances of the traffic," provides that such tolls shall be at all times charged equally to all persons, and after the same rate in respect of all goods of the same description, conveyed only over the same portion of the line, "under the same circumstances," and in considering whether the goods of one person have been conveyed over a railway "under the same circumstances" as the goods of another person, the English courts have invariably held that the company has no right to consider the occupation or personal status of the shippers, but must confine itself to a comparison of the services rendered by the railway to the respective shippers.

The case of Edwards *v.* G. W. Ry., 11 C. B., 73 E. C. L. 588, was decided November 15, 1851. The statute of 7 & 8 Vict., c. 3, s. 50, provided that in whatever way the charges of the G. W. R. Co. "may be made, they

shall be made equally to all passengers, and to all persons, in respect of all animals, and of all goods, wares, merchandise, etc., of like description and quality, and conveyed in, or propelled by, a like carriage or engine passing only over the same portion of, and over the same distance along, the said railway and under the like circumstances."

Parker was what is now known in this country as an express carrier, but in England was called an "intercepting" carrier, and did business over the defendant's railway. The defendant charged him, and other express carriers, higher rates than were charged others who were not such carriers. Jervis, C. J., said: "The question, therefore, is this, Is the fact of Parker being a carrier a different circumstance? or, are the goods carried under different circumstances when they are carried for anybody else? Now, looking at the words (of the statute), I cannot say that they are. The goods carried are of the like quality, and they are carried along the same portion of the railway, and by the same power, and at the same time, and subject to the same risks and liabilities. In the case of Pickford *v.* G. J. R. Co., 10 M. & W. 399, it was expressly decided that the fact of a person being a carrier made no difference in the circumstances. The words of the act of Parliament in that case were 'under the same circumstances,' which are nearly identical with those now in question."

It will be noticed that the court did not say that the goods being of the like quality, carried over the same portion of the railway, by the same power, and at the same time, etc., are the only circumstances that are to be regarded. On the contrary, all that the court said was, "that the fact of a person being a carrier made no difference in the circumstances." The case is authority for the position that whether Parker shipped from competitive points, or from points not competitive, he was entitled to the same rates at those points as the general public, and that his being an intercepting carrier could make no difference in the circumstances of his shipments; but the case is no authority whatever for the contention that Parker, though shipping from non-competitive points, was entitled to the same rates that may have been conceded by the company at points where competition prevailed.

The cases of Parker *v.* G. W. R. Co., 73 E. C. L. 545, 11 C. B., decided November 14, 1851, and Parker *v.* G. W. R. Co., 49 E. C. L. 253, 7 Man. & Gran., decided February 12, 1844, and Crouch *v.* L. & N. W. R. Co., 2 Car. & Ker. 789, and Crouch *v.* G. N. R. Co., 9 Exch., referred to in 1 Nev. & Mac. 16, were all cases of discrimination against intercepting carriers in favor of the general public, and where the discrimination was placed upon the sole ground of the occupation of the party discriminated against—they therefore need no comment in addition to what is said in relation to the Edwards case, referred to above.

The cases of Baxendale *v.* G. W. R. Co. (known as the Reading case), 1 Nev. & Mac. 202, decided Nov. 15, 1858; Garton *v.* G. W. R. Co., 1 Nev. & Mac. 214, decided Jan. 29, 1859, and G. W. R. Co. *v.* Sutton, L. R. 4 H. L. 226 (English and Irish Appeals), differ from the cases just noticed only in this: that the discriminations, while made against intercepting carriers, were not made in favor of the general public, but were made in favor of the railway companies themselves, they being engaged as rivals of the plaintiffs in the accessorial business of intercepting or express carriers; and the point decided was that if a railway company engages in such an accessorial business, it can no more discriminate in its own favor than it can in favor of another individual, or of the general public.

In the Sutton case, Law Reports, 4 H. L. 238, Mr. Justice Blackburn said: "The defendants (*i.e.*, the railway company) may, subject to the limitations in their special acts, charge what they think fit, but not more to one person than they, during the same time, charge to others 'under the same

circumstances,' and I think it follows from this, that if the defendants do charge more to one person than they, during the same time, charge to others, the charge is by virtue of the statute extortionate. It would be of the essence of the case to prove that the goods were of like description and carried under the like circumstances. But I think that this applies to the description of the goods, and the circumstances of the carriage, and not to the trade of the consignor or consignee." Again he said: "The circumstances must be those relating to the carriage, not to the consignor, and the fact that the plaintiff was a rival (express) carrier does not in itself make a difference in the circumstances, such as to justify a difference in the charge under the statute."

Mr. Justice Willes said: "Such (express) carriers are entitled to have their packed parcels carried upon the railway for the same price as other persons. This gives no preference to rivals in trade; it only puts carriers upon an equality with the rest of the public as to the price of the same work done for them by the company; . . . goods are conveyed under like circumstances where the route, risk, and expense are, in the opinion of the jury, the same. . . . In effect, I think the phrase 'like description' is exhausted upon the goods, and 'like circumstances' upon the route, expense, and risk of carriage, and that neither can be extended to the personal qualities of the individual who sends the goods.

Lord Chelmsford said: "I have felt greater difficulty in ascertaining the meaning of the words 'under the same,' or 'under like circumstances.' I do not see, however, how they can relate to anything else than the conveyance of the goods. To say that because the plaintiff is what has been called an intercepting (express) carrier, and the other persons using the railway are wholesale dealers, therefore the goods are not conveyed along the railway under the like circumstances, is an application of the words which I am unable to comprehend."

We quote largely from this case because it has been cited as holding that competition cannot, in any case, be regarded in considering whether one traffic is conducted under the same circumstances as another; but it is manifest that no such question was made or decided in the case. The only question touching the matter of competition that was considered by the court was the competition which existed between the plaintiff, Sutton, and the railway company in the accessorial express business. The railway company in that case acted in two distinct capacities:

First—As a railway company proper, in the transportation of freight and passengers from point to point.

Second—In the capacity of an express carrier, in collecting and delivering packages transported over the railway.

The point decided by the court was, that whenever a railway company assumes to act in the capacity of an express carrier, it must treat its own express business precisely as it treats express business offered to it by other express carriers. But as to whether a company, acting in its proper capacity as a railway company, may compete with other railway companies, or with water lines, and in such competition may concede lower rates at competitive points than prevail at non-competitive points, was not involved, nor was it even discussed by the judges in the Sutton case.

Quite an unfair use has been made of the Sutton case, by putting an improper emphasis upon certain words used by the justices, and by isolating those words from the connection in which they were used. Thus, Justice Blackburn has been quoted as having said that the words "under the like circumstances" applied only to the circumstances of the carriage; whereas, what he did say was, that those words applied to the circumstances of the carriage, and not to the trade of the consignor or consignee. Again he

said: "The circumstances must be those relating to the carriage, not to the consignor, and the fact that the plaintiff was a rival express carrier does not in itself make a difference of circumstances, such as to justify a difference in the charge under the statute."

In that case the only question was whether the circumstances of the carriage or the trade and occupation of the consignor should be considered; and all that his honor meant was that, as between two, the circumstances of the carriage ought to be regarded, and not the trade or occupation of the consignor. He did not intend to say that in no case was anything to be considered except the circumstances of the carriage.

Mr. Justice Willes has been quoted as saying that the effect of the phrase "like circumstances" is exhausted upon the route, expense, and risk of carriage. But what he did say is, that the phrase "like circumstances" is exhausted upon the route, expense, and risk of carriage, and must not be extended to the personal qualities of the individual who sends the goods.

Evidently his meaning was the same as that of Justice Blackburn. He did not intend to say that in no case could anything be considered except the route, expense, and risk of carriage. But he held that where the only question presented was whether consideration should be given to the route, expense, and risk of carriage, or whether it should be given to the personal qualities of the individual who sends the goods, it should be given to the former, and not to the latter.

Lord Chelmsford has been quoted as holding that the words "under the same circumstances" cannot relate to anything else than the conveyance of the goods; but what he did say was this: "I do not see, however, how they can relate to anything else than the conveyance of the goods. To say that because the plaintiff is what has been called an intercepting carrier and the other persons using the railway are wholesale dealers, therefore the goods are not conveyed along the railway under the like circumstances, is an application of the words which I am unable to comprehend."

He evidently meant no more than Justices Blackburn and Willes. He did not intend to say that in no case can anything be considered except the mere fact of the conveyance of the goods, but he meant that, as between that fact and the fact that the plaintiff was an intercepting carrier, consideration should be given to the former and not to the latter. In a word, all that was intended to be said by any of the justices was, that a railway company has no right to look to the occupation or personal status of a shipper; and the question as to whether the company would be justified in charging lower rates at competitive points, than it was charging at non-competitive points, was never presented to the minds of the justices, nor considered by them for a moment.

A Railway Company Cannot Legally Discriminate in Favor of a Traffic because of its Origin or Antecedents.—The English act of 1854 provides that "no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular description of traffic, nor shall any such company subject any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." See 1 Nev. & Mac. 2.

This class of cases is well illustrated by the case of Ransome v. E. C. R. Co., 1 Nev. & Mac. 63, decided January 29, 1857. It appeared in that case that the defendant railway company charged Ransome & Co., coal merchants at Ipswich, who shipped from thence over defendant's railway, coal which had come thither by sea, a higher rate for the carriage of their coal over the defendant's lines than was charged to Prior & Co., whose coal came over another railway to the defendant's at Peterborough. It appeared that

the lower rates were given to Prior & Co. to enable them to compete with Ransome & Co., whose coal had the advantage of cheaper transportation by sea, before reaching defendant's railway. The defendant, therefore, appeared to have discriminated in favor of Prior & Co., simply because it had cost them more to get their coal to the defendant's railway, than it had cost Ransome & Co. to get their coal there; and the court, in effect, held that a railway company cannot legally prefer one traffic to another, simply because the one has cost more than the other in getting it to the railway, or because one traffic was brought to the railway by sea, and the other by some different mode of conveyance. In other words, the origin or antecedents of a traffic are not to be considered by a railway company at all; if all the other circumstances are alike, one traffic is entitled to the same rates and facilities as the other.

A Railway Company Cannot Legally Discriminate in Favor of a Traffic, because of the Ultimate Use to which it is to be Put, After the Railway Transportation has been Completed and Ended.—In other words, that it is not for a railway company to consider whether goods shipped over its line are to be used for one purpose or another. This class of cases is illustrated by the case of M. S. & L. R. Co. *v.* Denaby Colliery Co., 4 Eng. R. and Canal Traffic Cases, 452, decided in December, 1884. It appeared in that case, that the plaintiff's railway ran through the South Yorkshire coal field, in which the defendant company's colliery was situated; and that most of the coal from that field was shipped over plaintiff's railway to Grimsby, on the sea-coast. The plaintiff's railway was the only railway leading from that coal field to Grimsby, so that plaintiff had no competition whatever for the traffic.

Some of the coal shipped to Grimsby was for "land sale" there, or local consumption. Some of it was sold to the Hamburg and American Steamship Co., for steam purposes. And some of it was shipped from Grimsby to English ports south of Harwich.

The Hamburg and American Steamship Co. had been using Welsh coal for their steamers, but it was ascertained by plaintiff that if the steamship company could get the South Yorkshire coal at a certain reduction on the then current price, they would buy coal at Grimsby, in place of the Welsh coal. To enable this to be done, and in the hope that the South Yorkshire coal might thus be introduced to the West Indian market, the plaintiff agreed to make to one Bannister a certain reduction from plaintiff's regular rates, upon all South Yorkshire coal sold to the Hamburg-American steamers. Plaintiff gave no public or other notice that it was allowing Bannister this reduction, nor did plaintiff notify the public that it would make similar reductions to other persons under similar circumstances. There was no contract on the part of Bannister that any definite quantity should be so shipped; and the services performed by plaintiff in respect of such coal were identical with those performed by it in respect of any other coal shipped to Grimsby.

The plaintiff also allowed said Bannister a certain reduction from plaintiff's regular rates on all coal shipped by him from Grimsby to English ports south of Harwich. There had been but little trade of that kind, and Bannister undertood to develop the trade, to provide vessels, and to run the risks incidental to the working of such a traffic; and in consideration of his doing so, and in view of the anticipated advantage to plaintiff by the increased tonnage over its railway, the plaintiff agreed to allow him the reduction upon such coal as he might ship to English ports south of Harwich. No opportunity was afforded to the public in general, or to other persons sending coal by plaintiff's railway to Grimsby, of getting the same reduction

on such coal as they might ship to English ports south of Harwich. There was no contract on the part of Bannister that he would ship any definite quantity of such coal; and the services performed by the plaintiff in respect to such coal as was shipped by Bannister from Grimsby to English ports south of Harwich were identical with the services performed by plaintiff in respect to any other coal shipped over plaintiff's railway from the South Yorkshire coal field to Grimsby.

As stated before, the plaintiff's railway was the only railway leading from the South Yorkshire coal field to Grimsby, and the plaintiff had no competition for that traffic.

The coal field was a local, non-competitive point on plaintiff's railway, and the only question before the court was whether a railway company can make a reduction from its regular local rates, in favor of one local shipper, merely because he agrees to try to develop a certain traffic, and thereby increase the tonnage of the railway, when he does not obligate himself to ship any definite quantity, in any specified time, and when the railway company does not offer similar reductions to other local shippers who may be as willing and as able to aid in developing the proposed traffic as the shipper who was favored.

But while it may be true that a railway company has no right to charge one local shipper less than another local shipper, merely because the former agrees to aid to some indefinite extent in developing a new traffic, it does not follow that either of the local shippers is entitled to rates that may be prevailing at competitive points.

The most that can be claimed as having been actually decided in the case is that where the services performed by a railway company in respect of one local shipment are identical with the services performed by said company in respect of another local shipment, the two shipments will be regarded as having been made "under the same circumstances," notwithstanding any difference that may exist between them as to the ultimate use to which they are to be put after their arrival at the place of common destination. But in deciding that proposition, the court did not decide that the services performed by a railway company are the only matter to be considered in determining the "circumstances" under which a shipment is made; and still less did the court decide that a shipment accepted under the duress of competition is accepted "under the same circumstances" as one made from a local point where no such competition exists. See the same case reported in L. R. 11 App. Cas. 97, where the decision of the Queen's Bench Division was affirmed by the House of Lords.

The case of Oxlade *v.* N. E. R. Co., 1 Nev. & Mac. 72, decided in 1857, may be said to belong to the same class as the Denaby case just noticed. In the Oxlade case it appeared that the defendant railway company, from a desire to introduce the northern coke into Staffordshire, charged less for the carriage of that kind of coke than they charged for other kinds of coke. It did not appear that the northern coke was mined upon defendant's line, or that the defendant was directly interested in its development; on the contrary, it seems to have been brought to the defendant's road from the M. C. R., just as the other cokes were brought to defendant's road from other railways.

The court held that the mere desire to introduce northern coke into Staffordshire was not a legitimate ground for discrimination in its favor against the other cokes. But the court remarked "that other special circumstances are stated in the arguments which, had they affected the pecuniary interests of the company, might have furnished ground for contention that the preference was not undue or unreasonable."

A Railway Company has No Right to Discriminate between Different Local

Shippers by Depriving One of Them of a Natural Advantage which He May Have over the Other, by Reason of Location, Distance, etc.—This class of cases is illustrated by the case of Ransome *v.* E. C. R. Co., 1 Nev. & Mac. 109, known as case No. 2, and decided on February 25, 1858. It appeared that after the decision of the first case between the parties, and which has been cited above, the defendant readjusted its rates upon an anomalous scale, which, while it applied to places where the plaintiff did not deal, as well as to places where he did deal, was so arranged as to practically continue the discrimination against him; and it was, therefore, "in reality a disguised infringement of the principles on which the judgment of the court had proceeded in the first case." The discrimination in the second case was effected, however, by so adjusting the rates as "to diminish the natural advantages which the position of the plaintiff and other dealers at Ipswich, by reason of its greater proximity, gave them over the dealers at Petersborough, in respect of the traffic of a certain territory, by annihilating, in point of expense of carriage, a certain portion of the distance between Petersborough and the aforesaid territory."

It does not appear that Petersborough was a competing point, or that it was other than a mere local station. The defendant had therefore undertaken to prefer shippers at one local station over shippers at another local station, in its adjustment of rates to the territory into which the shippers at both of said stations were in the habit of shipping competitive coals, by giving a lower mileage rate to the more distant station; no satisfactory explanation of its conduct was given by the defendant, and probably for the reason that none could be given.

See also the case of Denaby Main Colliery Co. *v.* M. S. & L. R., 8 Nev. & Mac., 426.

A Railway Company has No Right to Give to Some of its Local Shippers the Benefit of Competitive Rates, while it Refuses those Rates to Other Shippers, upon Some Ground that is Capricious, Arbitrary, and Unreasonable.—An illustration of this class of cases will be found in the case of Budd *v.* L. & N. W. R., which was decided June 18, 1877. See 4 Eng. R. and Canal Traffic Cases, 393 (Brown & Macnamara). The plaintiff's company were the proprietors of iron and tin-plate works situate near defendant's railway, running from the seaport of Swansea to Liverpool, and about twelve miles from Swansea. The defendant charged plaintiff's company higher rates on plaintiff's traffic to Liverpool than were charged by defendant upon similar traffic to other manufacturers whose works were situate within a radius of six miles of Swansea. There was communication by sea between Swansea and Liverpool, "but the distance was greater than by railway. The sea passage was cheaper than the railway, but manufacturers preferred the railway because delivery was quicker and more certain. There was, however, an arrangement between the carriers of goods by sea and the defendants, for the carriage of such goods," and defendant's rate (from Swansea) was fixed to enable defendant to compete with the sea carriage.

Chief Baron Kelly was of opinion that the defendant's conduct amounted to an undue preference and advantage to the manufacturers within the six-mile radius of Swansea; because it enabled those manufacturers to sell their goods at a rate of ten or twelve per cent cheaper than the plaintiff's company in the Liverpool market.

The defendant had not confined its competitive rate to the town of Swansea proper, where the only semblance of competition existed; but had allowed the competitive rate to manufacturers whose works were outside of the town, provided they were not more than six miles from the town. The six-mile limit seems to have been a purely arbitrary arrangement on the part of the defendant; no reason whatever was offered for making it, and yet, in

the language of the Chief Baron, "a manufacturer who happened to be half a mile within the six-mile limit was preferred to one who happened to be immediately outside of it."

Manifestly none but Swansea shippers proper were entitled to the Swansea competitive rate; and defendant had no more right to allow that rate to manufacturers who were six miles away than to those who were sixty miles distant. The attempt to allow the Swansea competitive rate to local shippers whose works were six miles distant from Swansea was, of course, an undue preference of those local shippers, over other local shippers whose works may have actually adjoined those of the favored shippers, provided the former happened to be a few inches over the arbitrary six-mile limit.

In a word, it was an undue preference of one local shipper over another local shipper.

The court did not decide that the defendant could not charge a lower rate to meet competition at Swansea, when the freight was delivered by the shippers to the defendant at the regular Swansea station or depot. It may be claimed that the court would have gone that length, but no such point was actually decided. The Chief Baron said: "The question still would remain, supposing they are entitled to charge a lower rate for some and not for others, where are they to stop?" The defendant in that case claimed the right to extend its Swansea rate to a distance of six miles from Swansea, whereas it ought to have been confined to freights delivered at its Swansea station proper. Every shipper in the kingdom was entitled to the Swansea competitive rate, provided he would deliver his freight to the defendant at the Swansea station; and no shipper was entitled to that rate, if he delivered his freight at any other point, whether the point of delivery was sixty, or only six, miles distant from Swansea.

It is worthy of notice, in estimating the weight to which the Budd case is entitled, that there was, in reality, no actual competition at Swansea. The rail route was the shortest, quickest, and most certain, and therefore preferred. There was an arrangement of some sort existing between the defendant and the carriers by sea, which had resulted in the rate which defendant was charging from Swansea; and as the nature of that arrangement is not disclosed, probably "a pool" existed between the defendant and the carriers by sea, by which an agreed rate on the traffic from Swansea to Liverpool was fixed high enough to justify the defendant in dividing the proceeds of the traffic with the sea carriers. What effect the suspicion of such an arrangement may have had upon the mind of the Chief Baron, of course, cannot be known.

A Railway Company Cannot Legally Discriminate in favor of One Local Shipper against another Local Shipper merely to Prevent a Threatened Competition at a Point where no Actual Competition Exists.—The cases of Harris *v.* Cockermouth R. Co., 1 Nev. & Mac. 97, decided January 15, 1858; State Co. *v.* Festiniog R. Co., 2 Nev. & Mac. 73, decided in December, 1874, and the case of Holland *et al. v.* Festiniog R. Co., 2 Nev. & Mac. 278, decided in February, 1876, all belong to this class. There was no actual existing competition in either of the cases, and yet the railway companies had undertaken to concede lower rates to certain local shippers than to others, with the hope that they would thereby secure the traffic of the favored shippers and prevent them from constructing, or aiding in the construction of, rival lines. In the Harris case it appeared that the plaintiffs shipped coal over the defendant's railway, as did also certain tenants of Lord Lonsdale. The shipments were made from different stations, but they were all made from the same district, and all of the stations from which the shipments were made were within half a mile of each other; for all practical purposes the shipments were all made from the same point, and to the same

point. There was no existing competition whatever; but the defendant averred that Lord Lonsdale had threatened to build a competing line, unless his tenants were given lower rates than the plaintiffs, and that the defendant had made the concession to his tenants for fear that Lord Lonsdale would execute his threat, and injure defendant's business by building the competing line. The court held that a mere threat of that kind was no sufficient justification for such a preference. Willes, J., said that "it would be absurd to proceed upon mere speculations as to what may happen," and that the court could only deal with the state of things actually existing.

The defendant had confessedly undertaken to give one local shipper a preference over another local shipper, where both were shipping under substantially similar circumstances and conditions, merely because the former had threatened to build a competing line some time in the future. The court was careful to distinguish the case then before them from one where actual competition exists, and it was in that case that Cockburn, Chief Justice, said, that the court had intimated, if not absolutely decided, that a railway company is entitled to take into consideration any special circumstances, either of a general or of a local character, including the circumstances of actual competition with another railway.

In the cases of The Slate Co. *v.* Festiniog R. Co., 2 Nev. & Mac. 73, and Holland *et al. v.* Festiniog R. Co., 2 Nev. & Mac. 278, it appeared that the slate quarries were all located in the same district and shipped to the same market over the defendant's railway. There was no other railway or competing route by which any of the slate could be shipped. The defendant railway company, with the object of discouraging the construction of a competing line, had agreed to carry slate for certain quarry-owners at a lower rate than was charged to the other quarry-owners in the same district. The favored quarry-owners had obligated themselves to ship all their slates over the defendant's line for a certain number of years, but they had not agreed to ship any definite quantity, in any specified time, nor in train-load lots.

The same terms were offered to the plaintiffs, but they refused to accept them. The decision in effect was as in the Harris case—viz., that a railway company has no right to prefer one local shipper to another, simply because the former has agreed to give all of its traffic to the company, and not to aid in the construction of a competing line.

A Railway Company Cannot Legally Discriminate in favor of One Local Shipper against Another Local Shipper Simply because the Former has Agreed to Ship the Whole, or Some Indefinite Amount, of his Traffic Over the Defendant's Line, while the Other has Not.—In this class may be placed the cases of Baxendale *v.* G. W. R. Co. (known as the Bristol case), 1 Nev. & Mac. 191, decided November 9, 1858, and the case of Bellsdyke Coal Co. *v.* N. B. R. Co., 2 Nev. & Mac. 105, decided in March, 1875. In the latter case it appeared that the defendant railway company had given to Messrs. Baird less rates upon coal than it charged the plaintiffs and other coal owners, nothwithstanding the coal mines were all located in the same district and shipped to the same markets. The defendant's railway was the only one running into that district, and had no actual competition whatever.

One excuse given by the defendant for the preference in favor of Messrs. Baird was, that the latter had agreed to ship all of the traffic of one of their coal mines by defendant's railway; but they had not obligated themselves to ship any specific quantities at regular periods, nor in train-load lots.

It was not pretended that the discrimination in favor of Messrs. Baird would have been unjust if they had bound themselves to ship definite quantities, at regular periods, and in train-load lots; because such traffic could have been handled by the company at less cost. But the agreement of

Messrs. Baird having been wholly indefinite, the English commissioners were of the opinion that there was no reason to believe that the traffic of Messrs. Baird could be handled by the defendant at any less cost than the traffic of the plaintiffs, and that as all the coal mines were situated in the same district and shipped to the same markets, there was no substantial difference in their circumstances.

A Railway Company Cannot Legally Discriminate in favor of One Competitive Shipper against Another Competitive Shipper, Shipping the Same Class of Freight between the Same Competitive Points, Unless there be Some Substantial Difference in the Cost of the Service to the Company. —The case of Garton *v.* B. & E. R. Co., 1 Nev. & Mac. 218, decided June 13, 1859, will furnish one illustration of this class of cases. It appeared in that case that certain special contracts had been entered into by the defendant with certain individuals, under which those persons were charged lower rates than the plaintiff Garton in the carriage of heavy packages of grocery and hardware between Bristol and Bridgewater. It was suggested that the reason for such discrimination was, that the persons with whom the special contracts were made had agreed to ship all of their goods by defendant's railway, and not by water or other means. It is evident from the opinions of the judges that they did not believe that the reason assigned was the true one. It was not shown that there was any actual competition by water between Bristol and Bridgewater; and if there was, it was not shown what the rate of charge for such water carriage was as compared with the rates charged by defendant's railway. Without undertaking to express an opinion as to the legality of such contracts, if the court had been satisfied of their *bona fides*, it was held that the plaintiff had made out a *prima facie* case in showing that he did not have the same rates and facilities afforded him for the conveyance of his goods, as were conceded to the favored individuals with whom the special contracts were made.

The special contracts in the case last cited were for the shipments of indefinite quantities. If the contracts had been for the shipment of definite quantities, at regular intervals, in train-load lots, there could have been no question as to the legality of the preferences under the numerous cases cited in the preceding part of this argument; because freight shipped in definite quantities, at regular intervals, can be handled at less cost to the company than where it is uncertain in amount, and uncertain as to when it will be offered for shipment.

The case of Thompson *et al. v.* L. & N. W. R. Co., 2 Nev. & Mac. 115, decided by the English railway commissioners in February, 1875, and the case of L. & N. W. R. Co. *v.* Evershed, decided by the House of Lords July 5, 1878, L. R. 3 App. Cas. 1029 *et seq.*, furnish another illustration of the class of cases now under consideration. They both grew out of discriminations made by the London & Northwestern R. Co. between certain competitive shippers at Burton-upon-Trent, and are substantially alike in all of their essential facts. There were three railway companies having stations in the town of Burton-upon-Trent, by any one of which goods could be sent from Burton to any part of the United Kingdom. The Midland R. Co. and the London & Northwestern R. Co. were two of those companies, and in active competition with each other at that point. Certain persons owned breweries adjacent to the main line of the Midland Ry., and had side tracks running from said main line into their breweries, so that their freights could be loaded and unloaded by their own servants directly upon the cars of the Midland Ry., without any expense for drayage or other terminal charges.

The practice with most of the English railway companies is to collect or receive freights at the houses of consignors, haul them to the railway depot at place of shipment, load them upon the cars, and after carrying them upon

their trains to stations of destination, the companies unload them and haul them to the houses of consignees. The companies charge for hauling, loading, and unloading when those services are performed by them, but if shippers see proper to haul, load and unload their own freights, or to employ some third person to do it, the railway companies charge only for carrying the freight in their trains from point of shipment to point of destination, and this last mentioned charge is known as the "station to station rate."

As the persons above referred to, whose breweries were connected with the Midland Railway by side-tracks, did their own loading and unloading into and out of the cars of the Midland Railway, and as their goods were not hauled or drayed to or from its railway, the Midland company made no charge against those persons except the "station to station rate;" and even allowed them a certain rebate from that rate. The London & Northwestern R. Co. charged the plaintiffs, and the public generally, at Burton, whose breweries were not connected with the Midland Railway, in addition to the "station to station" rate, certain rates for hauling, loading, and unloading; but in order to compete for the business of those persons whose breweries were connected with the Midland Railway by side-tracks, the L. & N. W. R. Co. agreed to haul their freights to and from the depot, to load and unload them free of charge, and to allow them the same rebate on the "station to station" rate as was allowed them by the Midland R. Co. It was held that this was an undue preference of those persons over the plaintiffs and the general public at Furton.

The English commissioners (2 Nev. & Mac. 119) refer to the fact that there was no agreement on the part of the persons favored to ship any definite quantity of freight by the L. & N. W. Ry., and that there was no evidence of any saving of cost to that company, to compensate it for the concession made to those persons; the preference therefore could not be justified upon the ground that it was to the pecuniary advantage of the defendant. The defendant then took the broad ground that any "advantage given by a railway company to obtain traffic for which it competes with another railway company" is not undue or unreasonable in the sense of the statute; but the commissioners replied: "Such a proposition cannot, in our opinion, be laid down unreservedly. It may be true in certain circumstances; it would not be so in others, and what degree of favor can lawfully be shown to some persons to the prejudice of others, under the pressure of competition, can only be decided in any case that arises by a reference to its special circumstances." 2 Nev. & Mac. 120.

The Reporters in their note to Thompson *v.* L. & N. R. Co., 2 Nev. & Mac. 121, state the rule as then understood in England as follows: "It appears that competition between two railways, or by sea, or canal, is a sufficient justification for a railway company reducing its fares to the public who are affected by such competition, and can take advantage of it. But that a railway company cannot, merely for the sake of increasing their traffic, reduce their fares in favor of individuals, unless there is a sufficient consideration for such reduction, which shall lessen the cost to the company of conveyance, or other services rendered by them to such individuals." Citing Strick *et al. v.* Swansea Canal Co., 16 C. B. N. S. 245; Ransome's Case (No. 1), 1 Nev. & Mac. 63; Oxlade's Case (No. 1), 1 Nev. & Mac. 72; Harris' Case, 1 Nev. & Mac. 97; Nicholson's Case, 1 Nev. & Mac. 121-143; Garton *v.* B. & E. Ry., 1 Nev. & Mac. 218.

This note of the Reporters states exactly the English law, which is that a railway company may, in order to meet competition with other railways or with water lines, reduce its fares or rates to the public at such competitive points, provided it makes its reductions equally and impartially to every one who offers to ship from such competitive points. But it can no more dis-

criminate between different competitive shippers at competitive points, than it can discriminate between different non-competitive shippers at non-competitive points, unless the shippers have obligated themselves to ship definite quantities, at regular intervals, in train-load lots, or have in some other way, offered a traffic to the company which can be conducted at less cost to the company than other traffic.

In the Evershed case, above cited, L. & N. W. R. Co., 3 App. Cas. 1035, the London & Northwestern R. Co., had discriminated in favor of Messrs. Trueman and Messrs. Inn, whose breweries were connected with the Midland Ry. by side-track, against Evershed, whose brewery was not connected with the railway. The discrimination was precisely the same as in the Thompson case last cited. The Lord Chancellor (Cairns) said: "The question in cases like the present must always be simply this: Is the plaintiff in the action obliged to pay one sort of remuneration for services which the railway company performs for him, while the company performs the same services for other traders, either for less remuneration, or for no remuneration at all. . . . The railway company is, in the collecting, loading and delivering of goods, performing identically the same service for the plaintiff in this action as the two other firms of brewers whose names have been referred to.

"Now, as a matter of policy and expediency, it may well be that the appellants have good reasons for treating those other firms in the way they do; it may be, that if they do not do that, those other firms, from the natural advantages of the situation which they have been able to occupy, will send their goods by another railway, and not by the railway of appellants. But with those considerations the plaintiff in the action has nothing whatever to do. That is exactly one of those things which Parliament has not left open to railway companies to judge of—whether in that way they will equalize their capacity for competing with other lines or not. The one right, to my mind, the clear and undoubted right, of a public trader is to see that he is receiving from a railway company equal treatment with other traders of the same kind, doing the same business and supplying the same traffic. In my opinion, that is not the case with regard to this plaintiff, and therefore I think he is entitled to recover the moneys he has paid under protest."

It will be noticed that in the Evershed, as in the Thompson case, the railway company was discriminating in favor of certain competitive shippers against certain other competitive shippers at the same competitive point, where the services rendered by the railway company to the different shippers were precisely the same, and where they were rendered under precisely the same circumstances and conditions; and that it was with reference to that kind of discrimination that the chancellor was speaking when he said that it was one of those things which Parliament has not left open for railway companies to do. And when he used the expression that railway companies cannot equalize their capacity for competing with other lines by discriminating between different shippers, he referred to discrimination between different competitive shippers at the same competitive point; and was not considering the right of the company to reduce rates at competitive points to meet competition with rival lines, where such competitive rates are offered equally and impartially to every one proposing to ship from such competitive points.

It will be seen by reference to the opinions in the Budd case, commented upon *supra* of this argument, that the judges based their decisions in that case upon the decision in the Evershed case, and that two of the three judges in the Budd case seem to have followed the Evershed case rather reluctantly.

The difference between the Budd case and the Evershed case was simply

this: That in the Budd case the railway company had attempted to give to certain local shippers, within a certain arbitrary six-mile radius, the benefit of the competitive rates prevailing at Swansea proper, while it refused to allow those rates to other local shippers whose manufactories were located just outside of the arbitrary limit; whereas, in the Evershed case, the company was discriminating in favor of certain competitive shippers, against certain other competitive shippers, at the same competitive point, while the services rendered by the company to all the competitive shippers were precisely the same, and rendered under precisely similar circumstances and conditions.

American Cases upon the Circumstances and Conditions under which Competitive Transportation is Conducted.—The constitution of Colorado provides that "all individuals, associations, and corporations shall have equal rights to have persons and property transported over any railroad in this State, and no undue or unreasonable discrimination shall be made in charges, or facilities of transportation of freight or passengers within the State," etc.

The Atchison, Topeka & Santa Fé R. Co. (hereinafter called the "Atchison" R. Co.) operated a railroad from Kansas City to Pueblo, about 634 miles. When its line first reached Pueblo it had no connection of its own with Denver. The Denver & Rio Grande R. (hereinafter called the "Rio Grande" R.) was built and running between Denver and Pueblo, but the gauge of its track was different from that of the Atchison R. Other companies occupying different routes had at the time substantially the control of the transportation of passengers and freight between the Missouri river and Denver. The Atchison R. Co., being desirous of competing for this business, entered into an arrangement, as early as 1879, with the Rio Grande R. Co. for the formation of a through line of transportation for that purpose.

By this arrangement a third rail was to be put down on the track of the Rio Grande road, so as to admit of the passage of cars continuously over both roads, and terms were agreed upon for doing business, and for the division of rates. The object of the parties was to establish a new line which could be worked with rapidity and economy in competition with the old ones. In the division of rates, the Rio Grande company was allowed compensation at the rate of a mile and a half for every mile of actual haul.

As the distance from the Missouri river to Pueblo by this route was about the same as to Denver by the competing routes, the through rates over this line to and from Denver were usually made about the same as rates to and from Pueblo. This was necessary to compete with other lines for Denver business. Afterwards an agreement was made between the Atchison R. Co. and its competitors, by which rates were established between Denver and the Missouri river, and arrangements made for a division of business among those companies, and for the regulation of their conduct towards each other, with a view to avoiding competition between themselves or from others.

In 1882 the Denver & New Orleans R. Co. (hereinafter called the "New Orleans" R. Co.) completed its road between Denver and Pueblo, and requested of the Atchison R. Co. that it be placed upon an equal footing with the Rio Grande R. Co. in all traffic over the Atchison road, for which the New Orleans R. Co. and the Rio Grande R. Co. were competitors.

This request was refused, and the Atchison R. Co. continued its through business with the Rio Grande R. Co. as before, and declined to deliver freights or passengers at the junction of the New Orleans road, or to give or take through bills of lading, or to sell or receive through tickets, or to check baggage over that line. All passengers or freight coming from, or destined

for, that line were taken or delivered at the regular depot of the Atchison company in Pueblo, and the prices charged were according to the regular rates to and from that point, which were more than the Atchison company received on a division of through rates to and from Denver under its arrangement with the Rio Grande company.

The New Orleans company filed a bill against the Atchison company, the general purpose of which was to compel the Atchison company to unite with the New Orleans company in forming a through line of railroad transportation to and from Denver over the New Orleans road, with all the privileges as to exchange of business, division of rates, sale of tickets, issue of bills of lading, checking of baggage, etc., that were or might be granted to the Rio Grande R. Co., or to any other company competing with the New Orleans company for Denver business. See 110 U. S., 668, 669, 670, 671, A. T. & S. Railroad *v.* D. & N. O. Railroad.

This case bears a very close resemblance to the case of Napier *v.* G. & S. W. R. Co., 1 Nev. & Mac. 292, cited in the fourth section of this argument; and the United States supreme court, though not referring to that case, refused the relief sought by the complainant, as was done by the court in Napier's case. The United States supreme court, while holding that "both by the common law and by the constitution of Colorado, a railroad company is prohibited from discriminating unreasonably in favor of or against another company seeking to do business on its road," said that it did not follow that a company "must under all circumstances give one connecting road the same facilities and the same rates that it does to another, with which it has entered into contract relations for a continuous through line, and arranged facilities accordingly." And as to the rates insisted upon by the New Orleans company, the court used this language: "That the price must be reasonable is conceded, and it is no doubt true that in determining what is reasonable the prices charged for business coming from or going to other roads connecting at Pueblo may be taken into consideration. But the relation of the New Orleans company to the Atchison company is that of a Pueblo customer, and it does not necessarily follow that the price which the Atchison company gets for transporting to and from Pueblo, on a division of through rates among the component companies of a through line, to Denver, must settle the Pueblo local rates. It may be that the local rates to and from Pueblo are too high, and that they ought to be reduced, but that is an entirely different question from a division of through rates. There is no complaint of discrimination against the New Orleans company in respect to the regular Pueblo rates, neither is there anything, except the through rates, to show that the local rates are too high.

The bill does not seek to reduce the local rates, but only to get their company put into the same position as the Rio Grande company on a division of through rates. This cannot be done until it is shown that the relative situation of the two companies with the Atchison company, both as to the kind of service and as to the conditions under which it is to be performed, are substantially the same, so that what is reasonable for one must necessarily be reasonable for the other.

When a business connection shall be established between the New Orleans company and the Atchison company at their junction, and a continuous line formed, different questions may arise; but so long as it is now, we cannot say that, as a matter of law, the prices charged by the Atchison company for the transportation of persons and property coming from or going to the New Orleans road must necessarily be the same as are fixed for the continuous line over the Rio Grande railroad.

It will be seen that the opinion of the court establishes the following propositions:

First. That in order to meet competition, two or more railroad companies

may by voluntary agreement form a through line, and that the through rates charged over such line may be less than the sum of the locals of the roads forming the lines.

Second. That the proportion of the through rate which each of the companies receives may lawfully be less than the local rates charged by such company at the time for transportation over the entire length of its own road; and,

Third. That freight tendered to one of the companies at an intermediate point on the through line, though such point may be one of the termini of the road of such company, and though such freight may be transported by said company over its entire line, is not transported by it under substantially the same circumstances and conditions as other freight transported by it passing between competitive points, notwithstanding the freight in both cases may be carried over the entire length of such company's road, in the same cars, and in the same trains.

In other words, notwithstanding the service rendered by the company may be the same in both cases, the fact of competition in the one case, and not in the other, creates a substantial dissimilarity in the circumstances and conditions of the transportation.

The sixth section of the act of Congress, passed July 1, 1862, relative to the Union Pacific R. Co., provides that the government shall at all times have the preference in the use of the railroad "at fair and reasonable rates of compensation, not to exceed the amount paid by private parties for the same kind of service." See U. P. R. *v.* U. S., 104 U. S. 663. The words, for the same kind of service, evidently mean for services rendered "under substantially similar circumstances and conditions."

In a case between the same parties, reported in 117 U. S. 362, it appeared that the company's uniform rate for the transportation of local passengers between Council Bluffs and Ogden, when passengers purchased tickets at either of those places, was $78.50 each; but, by contracts with connecting railroad companies who sold through tickets at reduced rates from New York, San Francisco, and other places over their own and the Union Pacific R., the latter company received, as its proportion of the through ticket, only $54 for each through passenger carried between Council Bluffs and Ogden. Of course the reduced rates at which the through tickets were sold were the result of competition by other lines, at the points between which the through tickets were sold.

The contention on the part of the United States was, that local passengers carried on its account between Council Bluffs and Ogden should be carried at the same rates as were charged for through passengers passing between those points as part of a journey over the whole line, and the question of law involved in that contention as stated by the supreme court was, "whether the service rendered in transporting a local passenger between two points is, in law, identical with that rendered in transporting a through passenger between the same points as part of the transit over the distance of the whole line," and the court held that the service in the two cases was not identical.

It does not appear in the report, but it was doubtless the fact, that the local passengers were carried by the Union Pacific R. in the same trains, and in the same class of cars, as the through passengers. Or, in other words, that the service rendered by the company was precisely the same, so far as cost, risk, etc., were concerned, in the case of a through passenger as in the case of a local passenger, and the only reason that the transportation of the through passenger was not done under substantially similar circumstances and conditions as the transportation of the local passengers was, that in the former case competition controlled the rate for transportation, while in the other it did not.

It will be noticed that the case last cited bears a strong resemblance to the English cases of The Attorney-general *v.* B. & D. J. R. Co., 2 Eng. R. & C. Cas. 124; Hozier *v.* Caledonian R. Co., 1 Nev. & Mac. 28, and Jones *v.* E. C. R. Co., 1 Nev. & Mac. 45, cited in the fourth section of this argument, and in all three of which it was held, in effect, that non-competitive traffic was not conducted under the same circumstances as competitive traffic.

In the case of Ragan & Buffet *v.* Aiken, 9 Lea (Tenn.), 619, it appeared that the defendant was the owner of a railroad about fifteen miles long, running from Rogersville to a junction with the E. T., V. & G. R. The complainants were merchants at Rogersville, and they alleged that they had been required by the defendant to pay freight at a rate of from twenty to twenty-five cents per hundred pounds, the gross amount of their payments aggregating about four thousand dollars; that the defendant, as an inducement to other merchants in Lee county, Virginia, and Hancock county, Tennessee, to have their goods shipped to Rogersville over defendant's railroad, instead of by other routes, had entered into contracts not to charge them exceeding fifteen cents per hundred pounds on similar freights; and complainants insisted that such discrimination was illegal. The supreme court of Tennessee said "that in determining whether a company has given an undue preference to a particular person, the court may look to the interests of the company," citing and approving the case of Ransome *v.* E. C. R. Co., 1 C. B. U. S. 437, cited in the second section of this argument. The court further said that "if the charge on the goods of the party complaining is reasonable, and such as the company would be required to adhere to as to all persons in like condition, it may nevertheless lower the charge of another person, if it be to the advantage of the company, not inconsistent with the public interest, and based on a sufficient reason. It is obvious that the intention of the defendant, in this instance, was not to discriminate against the complainants in favor of any person of the same place and in the same condition. His object was to get business for his road from persons at a distance from its terminus, which otherwise would reach its destination by a different route. Under these circumstances we cannot see that the contracts complained of are against public policy, or that complainants have been damaged, if the charges on their goods were reasonable."

It is submitted that the case last cited is a direct authority for the position, that competitive traffic is not "in the same condition" as traffic that is not competitive; or, in other words, that the two traffics are not conducted under substantially similar circumstances and conditions.

In the case of *Ex parte* Koehler, reported in 21 Am. & Eng. R. R. Cas. 52, Deady, J., in considering the Oregon statute, which provides that no greater rates shall be charged for carrying similar property a short haul than a long one in the same direction, said: "The act prescribes a reasonable rate for carrying freight between Corvallis and Portland, or from either, to points intermediate thereto. But Corvallis is on the river, and has the advantage of water transportation for some months in the year. The carriage of goods by water usually costs less than by land, and as water crafts are allowed to carry at a rate less than a maximum fixed by the railway, they will get all the freight from this point, unless the latter is allowed to compete for it. But if, to do this, it must adopt the water rate for all the points intermediate between Portland and Corvallis, where there is no such competition, it is, in effect, required to carry freight to and from such points at a less rate than that which the legislature has declared to be reasonable, or else give up the business at Corvallis altogether. . . . It is not the fault or contrivance of the railway that compels this discrimination, but it is the necessary result of circumstances altogether beyond its control. It is not done wantonly, for the purpose of putting the one place up, or the other

down, but only to maintain its business against rival and competing lines of transportation. In other words, the matter, so far as the railway is concerned, resolves itself into a choice of evils. It must either compete with the boats during the season of water transportation, and carry freight below what the legislature declared to be a reasonable rate, or abandon the field and let its road go to rust. Nor can the shipper at the non-competing point, or over the short haul, complain so long as his goods are carried at a reasonable rate. It is not the fault of the railway that the shipper who does business at a competing point has the advantage of it. It is a natural advantage which he (the local shipper) must submit to, unless the legislature will undertake to equalize the matter by prohibiting the carriage of goods by water for a less rate than by rail."

The opinion of Judge Deady states clearly and forcibly the substantial difference that exists between the circumstances and conditions of competitive traffic and those of non-competitive traffic. Where the traffic is non-competitive, the railroad company can, according to the English cases, charge any rate that is reasonable, though according to some of the American cases the rate must be not only reasonable, but equal and impartial. But where the traffic is competitive, the railroad company is forced to "accept such rates as competition has established, or abandon the field and let its road go to rust." In the one case the company is free to act within the limits of reasonable and equal rates. In the other case it is forced to accept whatever may be offered.

NORTHERN PACIFIC RAILWAY CO.

v.

TERRITORY.

(Advance Case, Washington Territory. January 29, 1887.)

A court of equity will compel a railway company to construct a depot and give other railroad facilities at a proper and necessary place. As the duty to establish stations upon a public railway is a public duty, no demand for the placing of a station need be made by the State before bringing suit to enforce the duty.

PROCEEDING in the name of the Territory to compel the defendant to place, for the public convenience and use, a depot and other railway facilities at Yakima City. Judgment was given against the company, and it appealed. Yakima City was the county town; was the oldest town and principal business centre in the locality; the courts were held there; it had five hundred inhabitants, several churches, successful public and private schools, and many business buildings and beautiful residences. The business done in the town exceeding $200.000 yearly. There were available grounds for a depot, etc. When the road was under construction there was an agency for the transaction of a freight and passenger business, but when the track had reached a point four

miles beyond the town, at a place designated North Yakima, a town on paper only, with no inhabitants but a few land speculators, who, secretly learning of a proposed depot there, being in the secrets of the company, had gone there to profit at the expense of Yakima City and its founders. The trains were then run through Yakima City without stopping.

McNaught, Ferry, McNaught & Mitchell for plaintiff in error.

Reaves, Pruyn & Graves and *H. J. Snively contra.*

HOYT, J.—Not only was the relative position of the two towns as to population, industries, etc., as stated, but so far as the proof discloses, there was no material difference in the natural adaptibility of the two places, by way of location or otherwise, for a centre of railroad business. From the time the company thus moved its agency for the transaction of its business to North Yakima, it not only refused to regularly stop its trains at Yakima City, but it also refused to stop any of its trains there at any time or for any purpose, and thus compelled any passenger therefor to pass directly through to North Yakima, and then return the four miles as best they could, and all freight had to pay tribute to North Yakima in like manner. Such was the condition of things at about the time these proceedings were commenced, and the jury found that such would have been the condition of things at the time of the trial in the court below had the company continued to stop its trains at said Yakima City, and to give it facilities for the transaction of its freight and passenger business. It appears, however, that owing to the failure of the railroad company thus to stop its trains, the town had been to a certain extent depopulated. Still, at the time of trial the town contained two hotels, twenty-seven dwelling-houses, one flouring-mill, public and private schools, and a resident population of one hundred and fifty. It further appears that the said company furnished no facilities of any kind available to said town, excepting at the said town of North Yakima. It was upon this state of facts that the court below acted; and in their light we must determine whether or not it acted correctly. We say that it is upon these facts that the case must be decided; for, although there was a finding by the jury that the present facilities between North Yakima and Pasco were sufficient, we are of the opinion that, the facts being conceded or found, the determination of what are proper facilities thereunder is a matter of law for the court, and not a question of fact for the jury. Did the facts above stated warrant the court below in rendering the judgment in question? We will first examine the matter in a general way, and then notice the particular points raised by the brief of appellant. In the absence of legislation providing other means for regulating and controlling

FACTS.

the matter, we have no doubt of the power of a court of general jurisdiction, in a proper case, to compel a railroad to extend to the public proper facilities for the transaction of business. This we deem to be a necessary incident to the character of a railroad, and the rights it possesses, and the relation which it occupies to the public. Without this control, a railroad might be so managed as to be a public improvement only in name; while, to all intents and purposes, so far as results were concerned, it would be a private road, from the benefits of which the mass of the public could without reason be, at the pleasure of the company, entirely excluded. We think that in reason this right of control is fully established; and, if we investigate it in the light of authority, our conclusion will be assured; for, while the cases upon the subject are not numerous, yet those that have been cited by counsel for appellee, and others which we have examined, are of such authority, and so conclusive in argument, that we unhesitatingly accept them as the true exposition of the law upon the subject. See Railroad Co. *v.* Portland & O. C. R. Co, 63 Me. 280; State *v.* Republican Val. R. Co. 17 Neb. 647; State *v.* Hartford & N. H. R. Co. 29 Conn. 538; High on Extr. Rem. 225; Ruggles *v.* Illinois, 108 U. S. 526; Field on Corp. 585; Moses on Mand. 155–169. That the city of Yakima was of such importance at the time the railroad reached it, that the public interest required that depot facilities should be provided and trains stopped for the transaction of business, is so apparent that nothing need be said to satisfy any unprejudiced mind in regard thereto.

POWER OF COURTS TO COMPEL RAILWAY TO AFFORD FACILITIES.

It is true that a town of 500 inhabitants is not a large town; but, when we take into consideration the town was the largest one for a distance of hundreds of miles, and that by its age and enterprise it had established itself as the centre of business for that entire region, and grown to even that size without the aid of any railroad, it is clear to the moral as well as to the legal perception of every one that it was entitled to be fairly treated by the railroad, and to have extended to it the facilities usually given to towns of like size thus situated; and we are satisfied that there is not another instance on record where a town, as remote from others as this one, of even half its size, has been reached and passed through by a railroad, and then had all facilities denied it at the will of the railroad company. That this town was entitled to the facilities claimed, seems to have been assumed by the company at one time, as from the above facts we see that, for a short time after the road was constructed through the town, it furnished the same to as great an extent as could be expected of a newly constructed road. But as soon as the road reached a place four miles beyond, where the country was substantially unoccupied and unmarked, save by a few stakes stuck in the ground, a change

came over the company, and it all at once discovered that every reason that could be named or imagined pointed to this unoccupied spot as the proper place for its depot, and that Yakima City, which in the past, unaided by outside influences, had grown into a flourishing town, while the other had only grown bushes, was no longer entitled to be thought of in comparison therewith. The reasons which led to this change, and to this preference of the new town, which seems not only to have been located for the purpose of absorbing the hard-earned business of Yakima City, but had inaugurated its career in that direction by stealing the best half of its name, does not clearly appear from the record, but enough does appear therein to plainly suggest the reason for such action. Upon general principles, then, it was the duty of the railroad company to have furnished the required facilities at Yakima City, and its failure to do so was a moral and legal wrong. But it is said that the rights of the parties must be governed by the condition of things at the time of trial, and not as of the date of the commencement of the proceedings. This may be so; but, even if it is, we think that, under the circumstances of this case, even the town as it existed at the time of trial was entitled to have trains stop, and to have depot facilities furnished, for the accomodation of the public; for, while it is true that the showing of business at such town during the few months preceding the trial was not flattering, yet, as the decrease in business was not only the direct result of the decadence of the town by reason of the wrongful acts of the company, but was also no doubt much influenced by the fact that, in order for any business to be transacted that would show upon the books of the railroad, it had to first go four miles away from the market centre of the town, and then pay tribute to its rival. The town, small though it was, thus decreased in importance, was entitled to the relief demanded, unless some of the objections to the proceedings raised by the appellant are of such a nature as to avail it as a matter of defence herein. We will proceed to notice such of them as we consider pertinent, which have not already been sufficiently covered by what we have said.

1. It is objected that, as the road was still in the hands of the construction department, it could not be required to furnish the facilities in question. We think, however, that by causing such section of road to be examined and accepted by commissioners as fully completed, the company estopped itself from thereafter claiming that the same was still in process of construction, and that by such action the right and duty of a company to maintain and operate such section of road became fully vested and fixed. Besides, we doubt whether the courts would allow a company, even while constructing its

OBJECTION THAT ROAD WAS IN HANDS OF CONSTRUCTION DEPARTMENT.

road, to so manage it as to crush out one town on its line for the benefit of a rival one a few miles away.

2. No demand for the facilities required was ever made upon the company. That a demand would be necessary as a foundation of proceedings of this nature to establish a mere private right is conceded; but it was claimed by appellee that this was a question of public right, and that the company was neglecting to perform a duty which it owed to the public, and that in such a case a demand was not necessary. We think this claim is established by the facts and law of this case. See High on Extr. Rem. 203, 390; Ang. & A. on Corp. 715; Board Commissioners Knox Co. *v.* Aspinwall, 24 How. 876.

DEMAND.

3. That the public were not interested, and that, therefore, Yakima City, and not the Territory, was the proper party plaintiff. But as we think the proof shows that the public were interested, and had rights to be protected and enforced, we cannot sustain this objection.

INTEREST OF PUBLIC.

4. That the charter of the company vested in it discretion as to the location of its stations, and that this discretion could not be controlled by the courts. We do not think Congress ever intended to do more, by the section of the charter of the company upon which this claim is founded, than to authorize it, in a general way, to locate its stations where it might think necessary, and it seems clear that Congress never could have intended to make such company the sole judge in this matter as between its own interest or favoritism and the rights of the public at large. Such a construction would be clearly against public policy, and would only be adopted by the courts where no other was possible, and we do not think the language made use of in said section such as to oblige us to construe it as claimed by the company.

CHARTER RIGHTS.

5. That the granting of the relief prayed for is an encroachment on the legislative power, and not the exercise of judicial authority. We have already indicated our views upon this point, and need only to say, in addition, that, in our opinion, the authorities cited by appellant are not in point, and do not warrant the construction placed upon them by counsel.

JUDGMENT NOT A LEGISLATIVE ACT.

6. That the judgment rendered directing the issuance of a peremptory writ ordered that the acts therein commanded should be performed immediately, and that, as this was impossible, the judgment was void. In our opinion, there is nothing in this position, as we think the judgment, fairly construed, did nothing more than to command that the duties therein enjoined should be entered upon at once, and prosecuted with diligence until completed.

IMPOSSIBILITY OF PERFORMANCE.

Judgment affirmed.

GREAT WESTERN RAILWAY CO.

v.

MCCARTHY.

(*Advance Case, House of Lords.* 1887.)

Where a railway company has alternative charges for the carriage of goods, according as they are carried at owner's risk or not, it is not necessary that the tolls should be exhibited on a board, as prescribed by 8 Vict. c. 20, s. 93, in order that the consignor may have a reasonable alternative offered to him.

If the higher rate is reasonable *per se*, the rates need not be reasonable *inter se*, and, where the higher rate is within the statutory limit, the fact that the lower rate is so low that consignors universally adopt it is not evidence that the higher rate is unreasonable.

In an action for damages for injury to the respondent's cattle, admitted to have been caused by the negligence of the appellant company's servants, it was admitted that the respondent had signed a consignment note, upon the face of which the company gave notice that they had two rates for the conveyance of cattle—a higher rate, when they took the ordinary liability of carriers, and a reduced rate, when the sender relieved them from all liability for loss, damage, or delay, except such as arose from wilful misconduct on the part of the company's servants; and in the note the respondent undertook to relieve the company from all liability, except as above mentioned, in consideration of having his cattle carried at the reduced rate. It was also proved that there was a notice in the office where the consignment note was signed, to the effect that the company had two through rates for the conveyance of live stock—viz., an "owner's risk rate," and the "company's risk rate," which was ten per cent higher, up to the statutory limit, but that the company did not "admit liability" in certain specified cases. The respondent denied that he had ever seen this notice, but it was proved that he had for some years sent cattle at the reduced rate.

Held (reversing the judgment of the court below), that there was evidence that the company had offered to carry the respondent's cattle upon reasonable terms at the company's risk, and that therefore his contract to free them from liability in consideration of paying the reduced rate was good, and he was not entitled to recover.

THIS was an appeal from an order of the court of appeal in Ireland—the Lord Chancellor (Ashbourne), Fitzgibbon, Barry, and Naish, L.JJ.—made on the 20th Nov., 1885, in an action in which the respondent was plaintiff and the appellants were defendants.

The order appealed from affirmed an order of the exchequer division of the High Court of Justice in Ireland (Palles, C.B., and Dowse, B.), made on the 28th April, 1885, whereby a conditional order obtained by the appellants for setting aside the verdict in the action, or for a new trial, was discharged.

The case is reported in 18 L. Rep. Ir. 1.

The action was brought by the respondent (hereinafter called the plaintiff) against the City of Cork Steam Packet Co., Limited, and (by amendment of the writ) against the appellants to recover damages for alleged breaches of contract and of duty in and about the carriage and delivery of certain cattle of the plaintiff. The action was subsequently discontinued against the City of Cork Steam Packet Co., and the appellants (hereinafter called defendants) became the sole defendants on the record.

By this amended statement of claim, the plaintiff alleged that he delivered to the defendants eighty-nine head of cattle, to be carried from Bristol to Colney Hatch; that sixteen of the said cattle were killed, and sixteen others disabled in the course of the journey; that all were delivered at Colney Hatch in a damaged condition, and that by reason of the injuries sustained by the cattle they were delayed in transit, and the plaintiff lost the benefit of the market. The plaintiff further alleges that the defendants were liable, in respect to said cattle, either as common carriers of goods, or (in the alternative) as carriers of goods for hire, upon the terms that they should carry safely and securely, or (in the alternative) as carriers of goods for hire, who had been guilty of negligence.

The damages were laid at £593.

The statement of defence traversed all the material allegations in the statement of claim, and alleged that the plaintiff's cattle were received and carried by the defendants under a special contract, signed by the person delivering the cattle, and just and reasonable in its terms, to the effect that the defendants should not be liable for detention of or injury to the said cattle, unless arising from wilful misconduct on the part of defendants or their servants. And the defendants denied that the injuries complained of were caused by any such wilful misconduct.

The reply joined issue on the statement of defence.

The action was tried before Morris, C.J., and a special jury on the 12th of November, 1884.

It was proved on behalf of the plaintiff that eighty-nine head of cattle were on the 27th of April, 1883, consigned by him from Cork to Colney Hatch, on the Great Northern Railway, and that while the said cattle were being carried by the defendants between Bristol and London a collision occurred between the train in which they were carried and a wagon which was across the line, and thereby certain of the cattle were killed, and others were injured. The defendants admitted that the accident was due to the negligence of their servants; but at the conclusion of the plaintiff's case the learned judge, on the invitation of defendants' counsel, ruled that there was no evidence of wilful misconduct on the part of defendants or their servants.

The substantial question at issue between the parties at the trial,

and in the subsequent proceedings in the courts below, was whether the plaintiff was bound by the terms of the consignment note under which the cattle were received and carried by defendants.

The consignment note which was admitted to have been signed before the cattle were sent by the plaintiff's agent at Cork, Mr. J. J. Sheedy, was as follows:—

"Great Western Railway.—Consignment of cattle, horses, sheep, pigs, etc., to be carried at owner's risk. The Great Western Railway Co. hereby give notice that they have two rates for the conveyance of cattle, horses, sheep, pigs, etc.; one, the ordinary rate or toll, when they take the ordinary liability of the carrier; the other, a reduced rate, adopted when the sender relieves them of all liability of loss, damage, or delay, except upon proof that such loss, damage, or delay arose from wilful misconduct on the part of the company's servants.

"To the Great Western R. Co.—Cork station, April 27, 1883. —Receive and forward the undermentioned cattle or horses to be carried at the reduced rate, below the company's ordinary rate or toll, in consideration whereof I undertake to relieve the Great Western R. Co., and all other companies over whose lines the cattle or horses may pass, from all liability in case of damage or delay, except upon proof that such loss, detention, or injury arose from wilful misconduct on the part of the company's servants. I also agree to the conditions and regulations on the back of this note."

The conditions and regulations on the back of the note were immaterial, except the first, which embodied the terms appearing on the face of the note.

It was proved that the cattle were, in fact, carried and paid for at the reduced rate. The further evidence, and the course of the proceedings in the courts below, appear in the judgment of Lord Herschell.

Sir R. Webster, *Q. C.*, *Gibson*, *Q. C.* (of the Irish bar), and *R. S. Wright* for the appellants.

H. Matthews, *Q. C.*, and *M. J. Bourke* (of the Irish bar) for the respondents.

Solicitors for appellants, *R. R. Nelson*, *Jr.*, for *J.* and *C. Ambrose*, Dublin.

Solicitors for respondent, *Williamson*, *Hill & Co.*, for *E. A. Beytagh*, Dublin.

The arguments appear sufficiently from the judgment of their lordships.

The following cases were cited or referred to: Peek *v.* North Staffordshire R. Co., 10 H. of L. Cas. 473; Manchester, Sheffield & Lincolnshire R. Co. *v.* Brown, 50 L. T. Rep. N. S. 281; 8 App. Cas. 703; Foreman *v.* Great Western R. Co., 38 L. T. Rep. N. S. 851; Beal *v.* South Devon R. Co., 5 H. & N. 875; affirmed on

appeal, 3 H. & C. 337; McNally *v.* Lancashire & Yorkshire R. Co., 8 L. Rep. Ir. 81.

At the conclusion of the arguments their lordships took time to consider their judgment.

February 14.—Their lordships gave judgment as follows:—

LORD HERSCHELL.*—My Lords: The plaintiff in the action on which this appeal arises seeks to recover from the defendants the sum of £403 11*s.* 8*d.*, being the damages sustained by him owing to the injury to certain cattle consigned to the defendants to be carried from Cork to Colney Hatch, the injury having arisen from the negligence of the defendants' servants. The defendants do not dispute the negligence alleged, but they rely upon the contract under which the cattle were carried as exempting them from liability. The plaintiff admits that those who arranged for the carriage of the cattle on his behalf signed a consignment note in the following terms: "Receive and forward the undermentioned cattle or horses, to be carried at the reduced rate, below the company's ordinary rate or toll, in consideration whereof I undertake to relieve the Great Western Railway Co., and all other companies over whose lines the cattle or horses may pass, from all liability in case of damage or delay, except upon proof that such loss, detention, or injury arose from wilful misconduct on the part of the company's servants." But he insists that the condition exonerating the defendants from liability for the negligence of their servants is not "just and reasonable," and that the company are liable by reason of section 7 of the Railway and Canal Traffic Act, 1854, notwithstanding the terms of the contract under which they were carrying the cattle. This is, I think, the sole question in the action, for no evidence was given of "wilful misconduct on the part of the company's servants."

FACTS.

Before proceeding to consider the question thus raised, it may be desirable to state the course which the proceedings have taken in the courts below. At the conclusion of the trial of the action, Morris, C.J., before whom the case was tried, held that the contract signed by the plaintiff's agent did not exonerate the defendants, as there was no table of rates exposed, and there was not, in his opinion, a reasonable alternative offered. He accordingly entered judgment for the plaintiff. A conditional order to set aside this judgment, and enter judgment for the defendants, or for a new trial, was afterwards obtained in the exchequer division by the defendants. At the close of the argument the learned judges made an order absolute for a new trial, but reserved the formal statement of their reasons for the judgment until the next term. Whilst preparing these reasons, Palles,

PROCEEDINGS BELOW.

* In the interval between the argument of the case and the judgment, Lord Herschell had ceased to hold the office of Lord Chancellor.

C.B., came to the conclusion that the effect of the company's non-compliance with the provisions of the Railways Clauses Act of 1845 had not been sufficiently considered, and at his suggestion the order made was vacated by consent, and the case was re-argued before Palles, C.B., and Dowse, B. Those learned judges allowed the cause shown against the conditional order. They rested their judgment exclusively upon the ground that the defendants had not complied with section 93 of 8 Vict. c. 20, by exhibiting their tolls upon a board in the manner prescribed by that section, holding that no reasonable alternative could be said to be offered to the person whose goods were to be carried unless such alternative charge was exhibited by the company in the manner so prescribed. The case then went to the court of appeal. The learned judges of that tribunal, although they affirmed the decision of the court below, did not base their judgments upon the non-compliance with the provisions of section 93. I think it is manifest, from a perusal of their judgments, that they did not consider that the ground taken in the court below was a sound one. I confess I have no hesitation in arriving at the same conclusion. If reasonable terms were in fact offered to the consignor, I am quite unable to find anything, either in section 93 or in any other part of the Act of 8 Vict., to deprive the company of whatever would be the legal result of such an offer, because they failed to comply with the terms of sec. 93. The court of appeal decided the case on the ground that the only offer made to the plaintiff, other than that which he accepted, was, in their judgment, not just and reasonable. It becomes necessary, therefore, to examine the facts proved at the trial. I observe at the outset that the consignment note signed by the plaintiff's agent directs the company to carry the cattle "at the reduced rate, below the company's ordinary rate or toll." And these words manifestly refer to the earlier part of the consignment note, which contains a notice that the company "have two rates for the conveyance of cattle, etc.; one the ordinary rate or toll, when they take the ordinary liability of the carrier; the other a reduced rate, when the sender relieves them of all liability of loss, damage, or delay, except upon proof that such loss, damage, or delay arose from wilful misconduct on the part of the company's servants." This consignment note was no new document to the plaintiff's agent. He had constantly signed notes in this form. I can entertain no doubt that he was perfectly familiar with its contents. If he was not, he certainly ought to have been, and must be treated as if he were. He knew, therefore, that the company purported to have two rates, and to give him a choice between them. He states that he "never saw any rate but the one." And his father, who is in partnership with him in the shipping business, also states that he never saw any different scales of prices in the shipping office. But there appears

CONSIGNMENT NOTE.

to be no doubt that in 1880 or 1881 a notice was posted up in the office of the company, which was in these terms: "Great Western Railway of England. The Great Western Railway Co. hereby give notice that they have two rates for the conveyance of live stock from Cork to places in England, and forwarded over their line from New Milford or Bristol—namely, the owner's risk rate, at which the company undertake no risk in respect of rail transit, except for loss which can be proved to have arisen through wilful negligence or misconduct on the part of the company; and the company's risk rate, at which the company undertake the ordinary risk of carriers in respect of rail transit up to the following limits; Neat cattle, a sum not exceeding £15; pigs and sheep, a sum not exceeding £2; but do not admit liability for any animals dying of disease, or arriving at destination in such condition as to be able to walk from the truck." I will accept as a fact that the plaintiff's agent had not seen this notice. But he knew that there were two rates, and that he was requesting the company to carry the cattle at the lower one; and he could at once have ascertained what the higher rate was by inquiring of the company or by examining the notices exhibited in the office. Under these circumstances, I think it impossible to do otherwise than to hold that the offer to carry at the higher rate upon the terms of the notice was made to the plaintiff through his agent, and that he had the alternative presented to him by the company of either carrying at that rate upon those terms, or at the reduced rate upon the terms of the consignment note, and voluntarily elected to take the latter alternative. So far, I think, my views are in complete accord with those of all the judges who took part in the judgment of the court of appeal in Ireland. Taking the facts to be what I have indicated, I proceed to consider what is the law which must govern the determination of the case. I think the law upon some of the points that arise is conclusively settled by authority. It is not open to doubt since the case of Peek *v.* The North Staffordshire R. Co., 10 H. of L. Cas. 473, that a contract exempting the company from liability in the terms of the consignment note in the present case is *prima facie* not just and reasonable, and that, if no other alternative is offered to the consignor, the company are liable for the negligence of their servants, notwithstanding the stipulations of the contract of carriage. It is equally well settled, since the decision of your lordships' House in the case of The Manchester, Sheffield & Lincolnshire R. Co. *v.* Brown, 50 L. T. Rep. N. S. 281, 8 App. Cas. 703, that if the consignor has an offer *bona fide* made to him of having his goods carried upon terms just and rersonable, and voluntarily chooses, in consideration of a pecuniary benefit, to exonerate the carrier from any part of his ordinary responsibility, a contract thus limiting the

Notice.

Contract exempting from liability—Authorities.

carrier's liability may be just and reasonable, though without the alternative option it would not be so.

It appears to me that all the questions in the present case resolve themselves into this one: was the alternative offered to the plaintiff, and which it was open to him to accept in lieu of that contained in the contract which he in fact entered into, a just and reasonable one? I may remark before I proceed further that, in my opinion, the question whether a contract is just and reasonable with the meaning of the statute must be determined by the court or judge alone, and that it is not a question proper to be left to a jury, even though questions of fact be necessarily involved in its determination. I make this observation because Palles, C.B., appeared to think, and indeed acted upon the view, that if the plaintiff was not entitled to retain his judgment the proper course was to grant a new trial. With all respect to that learned judge, I find myself constrained by the language of the statute to take a different view. I now turn to the consideration of the terms upon which the company intimated that they were prepared to carry at what they designated the company's risk rate, and to the inquiry whether they constituted a reasonable alternative. I may advert, in the first place, to the expressions which have been more than once used by learned judges, that not only must the alternative offered be reasonable *per se*, but that the two alternatives must be reasonable *inter se*. It has been said that the difference of rate may be so small as to be illusory, or so great as to make the higher rate a prohibitory one. I am not sure that I am able to follow the reasoning upon which this view has proceeded, but it is not necessary in the present case to pronounce any opinion upon it. The difference of rate here is ten per cent, and it cannot, I think, be maintained that the difference is either so small as to be illusory or so great as to make the higher rate prohibitory. It does not appear to be doubted by any of the learned judges who dealt with the case in the court of appeal that but for the concluding words of the notice the decision must, on this part of the case, have been in favor of the defendants. But the terms offered by the notice have been held unreasonable on two grounds. The first is, that the company undertake the risk of carriers at the higher rate up to the limit of £15 only in the case of neat cattle, and £2 in the case of pigs and sheep. This ground was not relied on by all the learned judges; and, with deference to these who have expressed a contrary opinion, I am unable to see how the terms can on this account be pronounced unreasonable. The limit is that provided by the 7th section of the Railway and Canal Traffic Act; and if no such limit had been inserted in the notice the statute would have supplied it. It is true that the section provides for the declaration of a higher value and the payment of a reasonable percentage upon the excess

REASONABLENESS OF CONTRACT—HOW DETERMINED.

value so declared by way of compensation for the increased risk, and that such percentage shall be notified in the manner prescribed by the 11 Geo. 4 & 1 Will. 4, c. 68. But I can see nothing in the notice to exclude the statutory right to declare a higher value, and thus obtain an increased liability on the part of the company, or to show that the statutory requirements had not been complied with. All that the notice states is, that at the rate specified the company undertake the ordinary carrier's liability up to the limit of value specified in the statute. I cannot hold this to be unjust or unreasonable.

The other objection is a more serious one. It is said that the notice is unreasonable because the company intimate that they do not admit liability for any animals dying of disease or arriving at destination in such condition as to be able to walk from the truck. It is not easy to say exactly what was intended by these words, or what they mean; and if I thought that their effect was to exempt the company from liability when the disease was caused by the negligence of the defendant's servants, or by undue exposure, or when the animals, though able to walk from the truck, arrived in a damaged condition owing to such negligence, I should come without hesitation to the same conclusion as the court of appeal. But the question is, what is the true construction of these words, read with their context. I think the case cannot be put more favorably for the plaintiff than to consider what construction ought to be put upon the language used, supposing cattle to have been carried on the terms of the notice, and to have arrived damaged by the negligence of the defendant's servants, though able to walk from the truck, and that there were no statutory provisions limiting the free right of contract. Could the defendants in such a case have succeeded in claiming exemption from liability? If they could, I think the decision under appeal could be maintained. But, after carefully weighing the able arguments addressed to us on behalf of the plaintiff, I have come to the conclusion that, on the true construction of the contract, the company could not in such circumstances have established that they were exempt from liability. By the words which precede those under consideration, the company in unambiguous and unequivocal terms undertake the ordinary risk of carriers, and I do not think the words which follow can be construed as cutting down or qualifying this clear undertaking. The earlier words having undertaken liability, the company do not proceed to say "except in these particular cases," or that they "do not undertake liability," or "are to be exempt from liability" in such cases, but only that they "do not admit" liability. It appears to me that it would not be a sound construction to hold that the company, by the use of such words as these, had exonerated themselves from a liability which they had in another part of the same

LIABILITY FOR ANIMALS DYING FROM DISEASE.

document in terms undertaken. The utmost effect that could properly be given to them, in my opinion, would be to say that, whilst as regards animals not dying of disease, or unable to walk from the truck, the company admit that they are *prima facie* liable, they do not admit such liability as regards animals dying of disease, or able to walk from the truck on arrival. If this be the meaning, I can see nothing unreasonable in it. It puts no unreasonable onus on the consignor. But, whether this be the true meaning or not, I feel satisfied that, if the question had arisen in the manner I have suggested, the courts would not have held that it had the effect of exempting the defendants from liability for the negligence of their servants. It follows from what I have said that, in my opinion, the plaintiff was offered the alternative of having his cattle carried upon terms which I cannot do otherwise than adjudge to be just and reasonable. I have arrived at this conclusion solely on the construction of the document, uninfluenced by the consideration that the plaintiff's agent voluntarily signed a consignment note discharging the defendants from the liability he now seeks to impose. The legislature, as expounded by this House, has determined that, though such a contract has been made, the company may nevertheless be liable; and it is my function on the present occasion to administer and not to consider the expediency of the law. But I think it right to add that no injustice or hardship is inflicted on the plaintiff by the decision, which I believe to be the correct one, for it cannot be doubted that he would equally have signed the consignment, even if the obnoxious words had not been added to the notice which has been the subject of so much consideration. I have therefore to move your lordships that the judgment appealed from be reversed, and judgment in the action entered for the defendants, with costs, and that the respondent do pay the costs in the court of appeal and in this House.

Lord Watson.—My Lords:—The provisions of the Railway and Canal Traffic Act of 1854 make it no longer possible for a railway or canal company, by means of a notice or declaration, however explicit, to exempt themselves from liability for the loss of, or injury to, animals or goods in their possession for the purpose of carriage arising from their own or their servant's neglect or default. Every notice, condition, and declaration made or given by the company with the view of limiting, in any wise, their responsibility for such neglect or default is declared to be null and void. In order to protect the company, the limitation of their liability must, in the first place, be made the condition of a special contract, signed by those interested in the animals or goods carried, or by the person delivering the same for carriage; and, in the second place, the condition must be "adjudged

Exemption from liability.

by the court or judge before whom any question relating thereto shall be tried to be just and reasonable." The onus of showing that the condition is just and reasonable rests upon the company.

ONUS OF SHOWING REASONABLENESS OF CONDITION.

These are points arising upon the legal construction of section 7 of the Act of 1854, and they have been conclusively settled by the judgments of this House in Peek *v.* The North Staffordshire R. Co., 10 H. of L. Cas. 473, and The Manchester, Sheffield & Lincolnshire R. Co. *v.* Brown, 50 L. T. Rep. N. S. 281; 8 App. Cas. 703.

In the present case the agents of the respondent, who delivered his cattle to the City of Cork Steam Packet Co. for conveyance from Cork to Bristol, signed a special contract, by which they undertook to relieve the appellant company from all liability in case of damage or delay, except upon proof that such loss, detention or injury arose from wilful misconduct on the part of their servants. It is admitted that the injury sustained by the respondent's cattle in the course of their passage over the appellants' railway were occasioned by the neglect or default of the appellants' servants; but it is not alleged or proved that these servants were guilty of wilful misconduct. Accordingly, the whole controversy between the parties to this appeal depends upon the character of the condition inserted in the special contract. The appellant company do not dispute that it is incumbent upon them to satisfy the court that the condition was just and reasonable.

FACTS.

Whether a condition of that kind is just and reasonable is not a question of law, but a question of fact, or, it may be, a mixed question of law and fact, which must be determined according to the special circumstances of the contract in which it is inserted. It would, in my opinion, be highly inexpedient, even if it were practicable, in disposing of the present or any similar case, to attempt to define *ab ante* all the possible circumstances which will make such a condition just and reasonable as between the company and the person contracting with them for carriage. The effect of section 7 is not that the condition is necessarily unreasonable, but that it is to be deemed to be so unless the contrary appear, or is established to the satisfaction of the court. In justification of the special condition exempting them from liability for the neglect or default of their servants, the appellant company maintain that the respondent had the alternative offered to him of having his cattle carried by them at an ordinary and reasonable rate, they accepting the ordinary liability of common carriers. The respondent disputes both the existence and the reasonableness of the alleged alternative, and the only substantial question presented in the able arguments at the bar was whether, in point of fact, a reasonable alternative was offered and was available to the respondent.

REASONABLENESS OF CONDITION.

The consignment note, or, in other words, the special contract

which was subscribed by the respondent's agents, Thomas Sheedy & Sons, bears on the face of it a distinct statement that the company carry cattle at two different rates—the one an ordinary rate, with the ordinary liability of carriers, and the other a reduced rate, at owner's risk. The agent who actually subscribed the note, and was in the habit of signing similar notes, states in his evidence that he "never saw any rate but the one;" and his father, with whom he is in partnership, also says that he "never heard of there being two rates." Although I have great difficulty in giving credit to these statements, I am willing to assume that these persons never read, or, if they did read, paid no attention to, the terms of the consignment notes which they were in the habit of signing every Friday. But it is impossible to say, even on that assumption, that they had not due notice that the appellants were ready and willing to carry their cattle, without limitation of liability, for a higher rate than that which they were paying. Whether they did or did not take the trouble to inform themselves, they must be taken to have known the terms of their own contract, and, if so, they must be taken to have known that the appellants at the time when they contracted did offer to carry the cattle at carrier's risk. That is, in my opinion, sufficient to cast upon the respondent the onus of showing that the alternative rate offered to his agents had, as was suggested in argument, no real existence. In the office of the Cork Steam Packet Co., where the consignment note was issued to and signed by the agents of the respondent, there had been constantly exhibited, from and after the year 1881, a notice setting forth the terms upon which the company were ready to carry cattle at the higher rate. It is proved by Mr. Stanton, the appellant company's agent at Cork, that "after two trials of it shippers ceased to go at a higher rate." How far that circumstance can affect the reasonableness of the rate I shall consider hereafter. Meantime I content myself with the observation that Mr. Stanton's evidence does not imply that the rate had been withdrawn by the company, but the shippers had ceased to avail themselves of it because they preferred the lower rate. The notice contains the terms upon which the appellant company professed their willingness to carry, accepting the liability of carriers. The amount of the rate is not given in figures, but it is stated to be ten per cent. above the reduced or owner's risk rate which was paid for the respondent's cattle. The reduced rate, plus ten per cent., is proved to be within the maximum rates authorized by the company's special Acts; and therefore it must, in my opinion, be taken to be, in the circumstances of this case, a charge reasonable in amount. In Brown's case I said "*Prima facie* I am prepared to hold that a rate sanctioned by the legislature must be taken to be a reasonable rate. It may be shown to be in certain circumstances unreasonable, but I think the *a priori* presumption is in favor of its

NOTICE.

reasonableness." As that observation has been criticised by the learned Chief Baron, I shall endeavor to explain the meaning which it was intended to convey. A rate sanctioned by Act of Parliament is a legal rate, which the company can exact from all who employ them to carry, unless they have been disabled themselves from making the charge by conceding terms unduly favorable to some of their customers. Until it is shown that they cannot lawfully charge the statutory rate, it must, in my opinion, be regarded not only as lawful, but as reasonable. I do not think a court of law would be justified in entering upon an inquiry for the purpose of ascertaining whether the legislature had authorized an unreasonable rate, and without such an inquiry it would be manifestly unjust to hold that it was unreasonable. In Peek's Case the alternative rate which this House found to be unreasonable was not authorized by statute; it was an arbitrary charge fixed by the company with reference to the supposed liability of marble work to deterioration during its transit by rail. I venture to think that the noble lords who decided that case would have hesitated to impugn the reasonableness of the alternative rate if it had been within the maximum approved by both houses of Parliament on report of their respective committees. It was argued, however, that, although the higher rate is in itself reasonable, the two rates must nevertheless be reasonable *inter se*, or, in other words, that the alternatives offered to the public will cease to be reasonable whenever the lower rates for carriage at owner's risk is so small in amount as to induce all consignors of cattle to adopt it. That argument found favor with the learned Chief Baron, who seems to have thought that the fact proved by Mr. Stanton, that after two trials consignors ceased to send their cattle at the higher rate, afforded evidence of its unreasonableness. But I cannot assent to the proposition that a rate involving the ordinary liability of carriers, which would be lawful and unreasonable in the absence of a lower rate at owners' risk, becomes unreasonable because consignors invariably prefer the lower rate. The natural tendency of all consignors is to select the lower rate whenever, in their estimation, the deduction is sufficient to cover the risk which they undertake. Even if the deduction were more than sufficient for that purpose, I cannot understand why that should make the higher rate unreasonable. It may afford an inducement to the consignor to elect the lower rate, but it cannot, in my opinion, be justly characterized as a compulsion to do so. The circumstances of this case are very different from those of Peek's Case, where the compulsion consisted in fixing the higher rate at an amount unwarranted by statute and *per se* unreasonable.

LEGISLATIVE RATE PRESUMED REASONABLE.

The court of appeal have decided against the appellant company mainly on the ground that the company's risk is clogged with conditions, which limit the common-law liability for neglect or

default which they profess to undertake. By the terms of the notice, the company intimate that, in consideration of the higher rate, they "undertake the ordinary risk of carriers in respect of rail transit up to the following limits: Neat cattle a sum not exceeding £15, pigs and sheep a sum not exceeding £2, but do not admit liability for any animals dying of disease or arriving at destination in such condition as to be able to walk from the truck." The pecuniary limits of liability specified in the notice are simply those which are fixed by section 7 of the Railway and Canal Traffic Act, 1854. The notice does not set forth or refer to the relative provisions of that clause which empower the consignor to enlarge these limits by declaring the value of his live stock at the time of their delivery, the carriers being in that case entitled to charge a reasonable percentage on the excess of the declared over the statutory sum, provided they have duly notified such percentage or increased rate in the manner prescribed by 1 Will. 4, c. 68. The omission of a reference to the powers just conferred by statute upon the consignor cannot, in my opinion, have the effect of making the statutory limit absolute, or of depriving the consignor of his right to take advantage of these provisions if he chooses to do so. The concluding part of the notice, which relates to animals either dying from disease or able to walk from the truck on arrival at their destination, is a curious piece of composition, and its meaning and effect were fully discussed in the arguments addressed to us. The undertaking of the company to bear the ordinary risk of carriers, including, of course, all risk of loss or injury occassioned by their own or their servant's neglect, is expressed in terms absolute and unqualified, and that undertaking cannot, I apprehend, be cut down or impaired by subsequent conditions, unless these are expressed in terms plain and free from doubt. It cannot be presumed that the appellants meant to adject conditions inconsistent with the liability which they had previously undertaken for damage arising from the fault of themselves or of those for whom they are responsible.

LIABILITY OF COMPANY.

There are two classes of animals for which the appellants intimate that they do not admit liability, the first being animals dying of disease, and the second those arriving at their destination in such a condition as to be able to walk from the truck. Had the intimation been confined to the first of these classes, the construction of the sentence would have been free from difficulty. In my opinion, the words "an animal dying of disease" mean an animal whose death is owing to natural causes, and not to the act or default of any person. It appears to me, however, that animals arriving in such a condition as to be able to walk from the truck may include animals suffering from injuries occasioned by the neglect or default of the company's servants. I therefore read the words "arriving at destination in

— FOR DISEASED ANIMALS.

such a condition as to be able to walk from the truck," as applicable not only to diseased animals, but to cattle which have received injury during the journey by rail through the neglect or default of the appellants' servants; and the question arises, how are the words "do not admit liability" to be construed?

It was maintained for the respondent that they are equivalent to notice that the appellants do not "undertake" any liability for such injured animals, and therefore constitute an illegal exception from the risk of neglect or default previously undertaken. That argument appears to me to attribute to the words "do not admit" a meaning which they do not naturally bear, and were not intended to convey. A notice that the company do not admit liability is not the same thing as a notice that it is a condition of their carrying cattle that they are not to be subject to liability in the cases specified. It is a notice that in these cases they will not admit, but, on the contrary, will dispute, their liability; or in other words, that they will not pay until it is shown to their satisfaction, or established, that the cattle were injured through the neglect or default of their servants. It was suggested that, in that view of the meaning of the words, they amount to a threat that the appellants will litigate every claim made against them in respect of cattle able to walk from the truck. Even if that were the case, it does not appear to me to be a necessary consequence that a rate which, in the absence of such an intimation, would be lawful and reasonable is thereby made unlawful and unreasonable. The object of the intimation is not unintelligible. Cattle in the condition described may be removed from the railway premises without a word having been said as to their having been injured and a claim having been subsequently made, the honesty and validity of which the appellants have no proper means of testing. They have the right to dispute such claims whenever they are made; and I do not think it is wrong or contrary to the law that a company should inform senders of cattle that these claims when made will not be admitted until satisfactory evidence is produced. I see no reason to doubt that the intimation was made in good faith, and it does not appear to me that the respondent had any real cause to complain of the information given him. The case might be very different, if it appeared that the company were using threats for the purpose of driving timid consignors to adopt the lower rate at owner's risk. I have only to add that, although the question as to the reasonableness of the condition may with propriety be described as a jury question, yet it must always, in my opinion, be decided by the bench. When it arises in the course of a jury trial, it appears to me that the question is not within the province of the jury, because the legislature has especially enacted that it shall be determined by "the court or the judge," and the jury is neither the one nor the other. I think

CONSTRUCTION OF WORDS "NOT ADMIT LIABILITY."

that in such a case the presiding judge is bound to decide upon the evidence before him, and to direct the jury accordingly; and that he is not entitled to ask the jury to find the facts which he may consider it necessary to ascertain in forming his own judgment. Being of opinion that the condition in the special contract has been shown to be just and reasonable, I think the appellant company are entitled to the judgment proposed.

Lord Bramwell.—My Lords: The plaintiff in this case entered into an agreement with the defendants that they should not be liable to him if his cattle were damaged through the negligence of their servants. They have been damaged through such negligence, yet the plaintiff says the defendants are liable to him, because he says the agreement that they should not be liable for their servant's negligence was unjust and unreasonable. He says true, indeed, he got a valuable consideration for giving up their liability, but that he had no option in the matter. He says he had no option of having his cattle carried with full liability, for that the defendants only offered him the choice of two alternatives—the one which he took, and another which provided that they should not be liable if the cattle died of disease on the journey, or could walk out of the truck on its arrival. He says, therefore, that being offered only two alternatives, neither of which he was bound to accept, he is not a volunteer nor a free agent, and therefore cannot be said to have voluntarily accepted, nor consequently to have entered into a just and reasonable agreement. I say the plaintiff says all this. In truth I dare say he says nothing of the sort. He certainly did not say it till he got to the court of appeal. I dare say that the plaintiff was advised to bring his action, and that somehow, to quote Barry, L.J., he would be able to "wriggle" out of his agreement. I agree with the Lord Justice that it is shocking that such attempts are so often successful. It is an instance of the mischievous operation of the law which avoids an agreement voluntarily entered into. But for the respect which every judge ought to have for the opinion of his colleagues, I believe that the judgment of Barry, L. J., would have been for the defendants. There really is nothing unreasonable in such an agreement. I will not repeat what I said in The Manchester, Sheffield & Lincolnshire Ry. *v.* Brown. It is one of the bad consequences of the unfortunate construction put on the statute. He is a man who for years constantly has sent his cattle at a reduced fare and a reduced liability, with a full knowledge of what he was doing, and having had for years the benefit of the reduction in charge, who seeks to wriggle out of the bargain he made. I am of opinion that he is not entitled in point of law to do so. With great respect to the judges of the court of appeal, I think their judgment cannot be supported. In the first place the plaintiff knew nothing of the notice which he says improperly limited

Facts.

the responsibility of the company, when carrying at carrier's risk. He cannot say, therefore, that only two alternatives were offered to him, neither of which he was bound to accept. If he did not like the alternative he accepted he should have inquired what was the other. He voluntarily, therefore, accepted the offer made him I have said he got an equivalent. I do not understand it to be disputed that he got an equivalent. If it is, I find it as a fact against the plaintiff; and I do so, not because I know anything of cattle carrying, but because he does, and for years and time after time has availed himself of the opportunity of sending his cattle at owner's risk. But, further, if the plaintiff did not like the terms of owner's risk, he should have insisted on his cattle being carried at carrier's risk, disregarding the notice. It was said that he could not have enforced this because the defendants are not common carriers of cattle. I cannot see why they are not. The notice relied on would not prevent it. It will be a strange consequence of Peek *v.* The North Staffordshire Ry. that railway, not common carriers, but receiving what they like, cannot regulate the terms on which they will receive. Suppose an elephant was brought to them to carry, must they be liable for their servant's negligence in its carriage, notwithstanding their refusal to carry unless it was agreed they should not be?

But, further, I cannot read the clause not admitting liability as it has been read in the court of appeal. What was meant by the author of the foolish thing I know not; perhaps a limitation of liability. But the question is not what was meant, but what was said. And I declare I think the right meaning is the natural meaning—viz., in the case of animals dying of disease on the journey, or being able to walk out of the truck at the end, liability is not admitted, it must be proved. I am not sure this was not intended. Anyhow it is what is said, and I see no reason for altering the natural meaning. If so, it is rather a good thing for the public, as admitting by implication liability in all but the excepted cases. It does not affect the bargain, but at the utmost what is to be proved. Still further, if it is not the same point, suppose cattle were consigned at carrier's risk, and suppose the consignor knew of the notice; and suppose cattle died on the journey from disease contracted through defendants' negligence—an ingenious suggestion, though not very practical; or suppose cattle injured by negligence could walk out of the truck, surely the consignor might say, "I care not what you admit, you are liable." Would it not be true? I think it would. If the clause means no liability it is either void or not. The argument is that it is wrong, and therefore the plaintiff was not bound to agree to it. But if wrong it was null, and so unimportant. Finally, I am called on to say that the clause in the contract the plaintiff entered into was not just and reasonable. That

CLAUSE NOT ADMITTING LIABILITY—MEANING.

is a matter of fact. I am satisfied it was both. I cannot agree that the notice of a limit of liability for cattle, horses, and swine is objectionable. It does not preclude insurance, but applies when there is none. I think the judgment should be reversed.

Lord Fitzgerald.—My Lords: I concur in opinion with my noble and learned friends that the contract which the plaintiff entered into with the defendant company was a just and reasonable contract. The operation of the statute is, that no gene- Facts. ral notice given by the company shall be valid in law for the purpose of limiting their common-law liability, but such liability may be limited by terms expressed in a signed contract such as shall, in the opinion of a judge or court, be just and reasonable. The cattle were shipped at Cork by Thomas Sheedy & Son, a Cork firm representing the plaintiff. Thomas Sheedy, the father, stated he had been forty-five years in this shipping trade, but on cross-examination says: "Never heard of there being two rates." I cannot for one moment trust this statement, or believe it to be accurate, but must conclude that Mr. Thomas Sheedy forgot what he had been doing every week (probably for years past), signing consignment notes of cattle, stating "the company have two rates for the conveyance of cattle." His son John is more cautious. He says: "I never saw any rate but the one. I sign almost every Friday consignment notes." What he calls a consignment note is the special contract with the company containing a statement of the two rates (the ordinary or risk rate, and the reduced rate), and by which the shipper requires the company "to receive and forward the cattle to be carried at the reduced rate." If Mr. Sheedy, the elder, and his son were, as they allege, ignorant of the two rates, it is because they failed to use their eyes, or to make any the least inquiries on the subject; and no doubt if, since 1880, they had asked any of their principals at which of the two rates they should send their cattle, the answer would have been of course: "At the lowest; we'll take our chance." It was urged that there was really no alternative rate of which the shippers had notice at which they could ship at the risk of the company. This allegation seems to me to be unfounded in fact. The shippers well knew the reduced rate, and the notice posted in 1880, which continued to be posted on the office to at least the commencement of this action, expressly stated, that "the company's risk rate is 10 per cent. over and above the above-mentioned owner's risk rate;" but Mr. Stanton has proved that, "after two trials, shippers ceased to go to a higher rate." That is to say, they deliberately adopted the reduced rate, and ceased to make any inquiries about the other.

The decision of the court of appeal seems to have rested very much on the concluding passage of the notice posted in the company's office—viz., "but do not admit liability for any animals

dying of disease, or arriving at destination in such condition as to be able to walk from the truck." Thus the Lord Chancellor of Ireland observes upon it: "How can such a rate, with the addition of such a term, be regarded as a reasonable alternative? It lay upon the defendants to prove a just and reasonable alternative unshackled by illegal and void conditions." And his lordship's judgment seems very much, if not entirely, to rest on that foundation. Fitzgibbon, L. J., says that "the notice, when produced, contained two fatal conditions;" and the judgment of Naish, L.J., is in accordance with the Lord Chancellor's. I have some difficulty in reading the judgment of Barry, L.J., otherwise than as in effect a dissent, although he formally assents to the decision of the court. He says (*inter alia*): "I have had considerable doubts about the case, and frankly confess my reluctance to let a man escape from the consequences of his solemn and deliberate contracts, into which he has entered with as much knowledge of its legal effects, and its possible result, as any man in this court. The cattle dealers enter into these contracts, voyage after voyage, regardless of any alternative, simply availing themselves of a lower rate, putting money thereby into their pockets as long as the chance is favorable; but then, when casualties occur, they seek to wriggle out of their engagement by all the technicalities afforded by the Railway and Canal Traffic Act." I may observe that no judge on the Irish bench has had more experience of such cases than the Lord Justice. He adds: "I would be disposed to be of opinion that this contract *per se* on the face of it affords evidence of two things—viz., an unreasonable condition on the part of the company, and an offer by them of a reasonable alternative." And when he comes to deal with the "fatal conditions," he adds: "I feel great reluctance to decide against the company upon this notice. It was never, according to his own evidence, seen by the plaintiff or his agent. If it were seen, it would not in the least have affected his volition in adopting the low rate." I concur in the Lord Justice's reasons so far as I have stated them, and the case stands shortly thus: There were three rates: 1. The statutable maximum rate. 2. The company's risk rate, which was substantially less than the parliamentary rate. 3. The owner's risk rate, which was 10 per cent. lower than the company's risk rate. The cattle dealers must be taken to have known the parliamentary rate. They did know what the reduced or owner's risk rate was, and they did know, or could without any difficulty have ascertained, that the alternative rate offered was 10 per cent. above the owner's risk rate. Messrs Sheedy & Son, who are to be identified with the plaintiff, having the fullest knowledge or means of information, and having from week to week and from year to year adopted for their principles and obtained the pecuniary benefits flowing from the reduced rate, now turn round and allege that this

NOTICE CONSIDERED.

special contract is unreasonable and unjust, and does not afford them sufficient protection from being unjustly dealt with. In my opinion the allegation is entirely unfounded. There remains to be considered the concluding provisions of the alternative which are said to be "fatal and illegal," and to have rendered void the company's offer to accept the carrier's risk at common law. I do not think it necessary to pause on the limitation as to the value of neat cattle; that was satisfactorily disposed of in the court of exchequer, and by Lord Watson; but as to the "do not admit liability," etc., these words do not seem to import any exception or exemption out of the previous "undertake the ordinary risk of carriers," nor could they have that operation. As carriers of cattle, the company may be liable for the loss of animals dying on the journey. If, receiving an animal alive, they deliver a dead carcass at the end of the journey, they are *prima facie* liable, but if the animal died on the journey from disease which may have been contracted before it was received by the company, then the company may or may not have incurred responsibility, and all that the notice asserts is, in such a case we do not admit liability; we leave that to be determined on the facts. It seems to me to be very harmless, so innocuous as not even to ship the onus of proof, and certainly not open to be decribed as a "fatal condition." The remaining term of the notice, "or arriving at destination in such condition as to be able to walk from the truck" is somewhat more difficult of explanation. It does happen that cattle having to come a long journey by sea and land, such as from Cork to Colney Hatch, arrive in such a condition as to be unable to rise, or, if raised, to walk, and have to be slaughtered. In such a case there is *prima facie* a liability on the carrier; but he has the opportunity of examination and of showing that the condition of the cattle did not arise from any cause for which the carrier is responsible. There is another state of facts to be provided for—viz., where the cattle on arrival are "able to walk from the truck," and be delivered to and removed by the owner or consignee. In such cases, and to guard themselves against subsequent claims which they may have but small means if any, of investigating, the carriers say, "We do not admit liability; you may establish it." The same criticism applies to this as to the other cases; "do not admit," does not amount to any exception, exemption, or condition affecting ultimate responsibilities. The judgment which I delivered in The Manchester, Sheffield, and Lincolnshire R. Co. *v.* Brown was made the subject in the court of exchequer of criticisms which I do not think it useful to answer or to observe upon. I adhere to the opinion I expressed in that case, which receives ample confirmation in your lordship's present judgment. The principal ground on which the judgment of the court of exchequer rested was practically abandoned in the court of appeal, and has not been even mentioned at your lordship's

bar. It is unnecessary, therefore, to observe upon it. I agree that the order appealed from should be reversed.

Order appealed from reversed; judgment to be entered in the action for the defendants with costs; the respondent to bear the costs in the court of appeal, and the costs of the appeal to this House.

SMITH

v.

ST. LOUIS AND SAN FRANCISCO R. CO.

(85 *Missouri*, 418.)

By the terms of a written contract entered into between the Missouri Pacific R. Co. and the defendant, the passenger trains of the latter were to be drawn over the road of the former between the town of Pacific, defendant's eastern terminus, and the city of St. Louis; the Missouri Pacific company using its own locomotive and crew of same, and the defendant furnishing at its own expense all train men for the care and management of its trains, the manner of running the latter and the control and acts of said train men being subject to the rules and regulations of the Missouri Pacific company while so running on its track. *Held*, that there could be no recovery against defendant for the death of a passenger caused by the failure of the train to stop long enough for the deceased to alight at his destination and while the train was being operated between St. Louis and Pacific, the deceased having purchased his ticket from the Missouri Pacific company, and for transportation between St. Louis and the town of Webster where the accident occurred. (Black and Norton, JJ., dissenting.)

Under the contract between the two companies, the train by which the deceased was killed cannot be regarded as defendant's train in such a sense as to make it liable for the accident.

If the deceased was lawfully on defendant's train, and it had been operated by servants under its control, the defendant would be liable for an injury occasioned by the negligence of such servants, and this, too, irrespective of the company from which the ticket was purchased.

APPEAL from St. Louis court of appeal. Affirmed.

The following were the instructions given by the trial court for the plaintiff:—

"1. If the testimony shows that the cars composing the train which caused the death of plaintiff's husband belong to the defendant, and also shows that such train was, at the time of the accident, under the care and control of the defendant's agents and employees, then the defendant's liability to this action has been established. And the jurors are instructed that if the evidence shows that the conductor and brakeman in charge of the train at the time of the

accident were under the exclusive control and supervision of the defendant corporation as to compensation and service, then the train was under the care and control of the defendant's agents and employees.

"2. The court further instructs the jury, as a matter of law, that the liability of a railroad company engaged as a common carrier of passengers continues, not only while the passengers are in transit, but also so long as the passengers are in the reasonable act of leaving the cars and premises of the common carrier, on arrival at their place of destination.

"3. The jury are further instructed that the law makes it the duty of railway companies engaged as common carriers of passengers to cause their depots and stations where passengers are accustomed to arrive and depart to be so lighted at night that passengers could leave the cars and premises of such common carrier with reasonable safety; that railroad companies, owing to the dangerous character of the business they are engaged in, are held to the greatest possible care in the carriage of passengers, and are held responsible in law for the slightest neglect resulting in injury to passengers.

"4. The jury are further instructed that though the deceased may have remotely contributed to the injury which caused his death, yet, if the defendant, its agents, or servants in charge of said train of cars, could, by the exercise of care and prudence, have prevented the injury and death, then the defendant would be liable in this action, and the jury should find for the plaintiff, and their verdict should be for the sum claimed in the petition.

"5. The jury are further instructed if they find from all the evidence of the case, that the agents or servants of the defendant were guilty of negligence in their management of the train of cars on which the deceased was a passenger, as stated in the petition, and that in consequence alone of such negligence the deceased received injuries that caused his death, then the plaintiff would be entitled to recover in this action.

"6. The jury are instructed if they find from the evidence that the defendant was the owner of the car or cars on which said George E. Smith was a passenger, and that the train of cars was in charge of a conductor in the employ of the defendant; and if the jury further find from all the evidence that said train of cars was drawn by a steam-engine belonging to the Missouri Pacific R. Co. and the engineer thereof in the employ of the Missouri Pacific R. Co.; and if the jury further find from the evidence that defendant's cars were so drawn over the road of the Missouri Pacific R. Co., in pursuance of a private agreement and arrangement between the defendant and the said Missouri Pacific R. Co.—then the defendant would be liable in this action for negligent injury done said Smith as such passenger, that is, for such injury as the

evidence shows to have been occasioned by the negligence of the defendant's agents and employees.

"7. The jury are instructed as a matter of law, that a passenger is entitled to a reasonable time and to reasonably safe facilities for leaving the car in which he has been riding when a train is stopped for that purpose; and in ascertaining what would be a reasonable time and reasonably safe facilities, the jury should consider the time and place of alighting with all the facts and circumstances bearing upon the question, whether the time of stopping was reasonable and the place reasonably safe."

The instructions given at defendant's instance were as follows:—

"1. The court instructs the jury that if the jury believe from all the evidence in this case that the defendant, the St. Louis & San Francisco R. Co., had, upon the first day of January, 1879, and at the time of the accident complained of, a contract with the Missouri Pacific R. Co. for the transportation of its cars, freight, and passengers over its line of road from Pacific or Franklin to the city of St. Louis, and that by the terms and conditions of such contract the management, control, and direction of cars, agents and servants between said points aforesaid were under the sole management and control of the Missouri Pacific R. Co., and if you further believe that said accident occurred at a point between said city of St. Louis and Pacific, then your verdict and finding must be for the defendant.

"2. That if Smith's negligence in not getting off the train in due time, if you believe he was negligent in that particular, directly contributed to the injuries complained of, then, and in that case, plaintiff cannot recover in this action.

"3. The court instructs the jury that if they believe from all the evidence in the case that the train stopped a sufficient length of time at the depot to allow Mr. Smith to get off the same and on the platform, if he had exercised due care and diligence in doing so, then and in that case plaintiff cannot recover in this action."

C. F. Moulton, *Franklin Ferris* and *Edwin Silver* for appellant.

John O. Day for respondent.

HENRY, C.J.—The defendant owns and operates a railroad whose eastern terminus is the town of Pacific, about thirty miles west of St. Louis, and its trains are hauled back and forth between Pacific and St. Louis by the Missouri Pacific R. Co. over its road, under a contract between the companies, in substance as follows: First. The Missouri Pacific R. Co., party of the first part, agrees to furnish for defendant for five years, commencing January 1, 1879, "depot facilities for the handling of defendant's freight, and office room for its agents and clerks." "Second. The

FACTS.

said party of the first part agrees . . . to transport all of the passenger trains of defendant passing to and from St. Louis, to and from the point of junction of the roads of the parties of the first and second part, at Franklin or Pacific, and the Union depot at St. Louis." "The party of the first part to furnish at its own expense the locomotive and crew of same," and defendant to "furnish at its own expense all train-men for the care and management of said trains." Defendant's "trains, and the control and acts of said train-men" are "subject to the rules and regulations" of the Missouri Pacific; that defendant should "clean and care for the inside of its trains," and, also, defendant to pay "all expenses made and incurred on account of the use and occupation by its trains of the property and facilities of the Union Depot Co. at St. Louis." Third. The Missouri Pacific to "transport all of the freight trains and freight cars" of defendant "passing between St. Louis and Pacific at its own expense." Fourth. Missouri Pacific to transport all "passenger cars and trains" of defendant "with all reasonable promptness and despatch;" the defendant to "furnish free of mileage or other expense all the passenger or freight cars for the performance of its business between" St. Louis and Pacific. Fifth. The defendant agrees to indemnify the Missouri Pacific "against all loss or liability" on account of "any accident or damage" received on the road "through the fault or negligence" of the defendant, "or its agents or employees." Sixth. For the services so rendered by the Missouri Pacific for the first two years defendant agrees to pay "eleven per centum," and for the balance of the time "eleven and one half per centum" of the "entire amount of all the gross earnings of the defendant made and received by it on any and all of its passenger, freight, or other business which passes or is transported over the road" of the Missouri Pacific. The Missouri Pacific to "have access to the books and vouchers" of the defendant to "ascertain the amount of the gross earnings provided for in this agreement." Which contract was, on the day aforesaid, signed and their respective corporate seals affixed.

On the twenty-fifth of June, 1879, George E. Smith, husband of plaintiff, took passage at St. Louis on a train of cars owned by defendant, except the locomotive, which belonged to the Missouri Pacific, to go to Webster, a station on the Missouri Pacific Railroad between St. Louis and Pacific, under a commuter's ticket purchased by him of the Missouri Pacific R. Co. The train arrived at Webster about ten o'clock at night and stopped at the depot for passengers to get on and off. It was a dark night and the depot was not lighted, and in the act of getting off, or immediately after getting off, Smith fell between two of the cars, and at that moment the train started, and passing over him inflicted injuries of which he died soon after, and his widow instituted this suit against the defendant to recover damages. The negligence alleged is that the

train did not stop long enough to allow the deceased a reasonable time to alight, and that the depot was not lighted.

The principal and controlling question in the case is, whether, under the agreement between the companies, the train in question passing over the Missouri Pacific road between Pacific and St. Louis is to be regarded as defendant's train in a sense that makes it liable for injuries occasioned to the deceased by the negligence of the train-men. If answered, as we think it must be, in the negative, the judgment should be affirmed. By the terms of the contract the train of the defendant company was to be drawn over the Missouri Pacific road by the Missouri Pacific Co., the latter using its own locomotive and crew, and the train-men to be furnished by the defendant, but the Missouri Pacific Co. reserved the entire and exclusive control and management of the train, the crew, and the train-men. The contract for transportation was not made by the deceased with the defendant, but with the Missouri Pacific Co. It was not for transportation over any portion of defendant's road, but from St. Louis to Webster over the Pacific road. If deceased had been a passenger from a point on defendant's road under a contract for transportation to St. Louis, or from St. Louis to a station on its own road, another question would arise which it is not necessary to consider in this case. We are not to be understood as deciding that the fact that deceased bought his ticket from the Missouri Pacific Co. is conclusive against plaintiff's right to recover in this action, for, as held by the court of appeals, if he was lawfully on defendant's train, and it was operated by servants under its control, it matters not of which company he purchased the ticket, the defendant would be liable for any injury received by him occasioned by the negligence of its employees.

QUESTION STATED.

The case, therefore, turns upon the construction of the contract between the two companies. Parol evidence was properly admitted to show the meaning of the phrases "train-men" and "crew," as employed in the contract, and to show what are the duties of conductors and other train-men; and aside from the parol testimony of those employees that they were in the employment of the Missouri Pacific Co., the admissibility of which is questionable since that is a question to be determined by the written contract, in our opinion, by the terms of the contract the train-men were in the employment and under the control of the Missouri Pacific Co. while the train was passing over its road between St. Louis and the town of Pacific. This is so provided in express terms in the contract. The defendant was, by the agreement, to furnish free of all expense to the Missouri Pacific all the passenger and freight cars for the performance of its business between St. Louis and Pacific. It was no part of the defendant's business to carry passengers from

PAROL EVIDENCE ADMISSIBLE TO EXPLAIN CONTRACT.

St. Louis to any station between St. Louis and Pacific. It received no part of the money paid to the Missouri Pacific for carrying such passengers. It had no connection with the Missouri Pacific in that business, and that the latter company used defendant's cars and train-men in the prosecution of such business did not create a liability on the part of defendant, the Missouri Pacific Co. having reserved exclusive control of the train-men and the train.

The fifth clause of the contract, by which defendant agreed to indemnify the Missouri Pacific Co. "against all loss or liability" on account of "any accident or damage" received on the road "through the fault or negligence of the defendant or its agents or employees," giving it its broadest scope, does not alter the relation of the two companies to passengers from St. Louis to any station between that and Pacific. If it be so construed that if the plaintiff in this case had sued the Missouri Pacific Co. and recovered a judgment, the defendant would be liable to the Missouri Pacific, it is but a contract of indemnity, which, of itself, cannot create a liability on the part of defendant to such a passenger. That by the agreement the Missouri Pacific Co. was to pay no part of the wages of the train-men who were to be furnished by defendant, does not create a liability on the part of the defendant to a passenger from St. Louis to a station between that and Pacific, any more than an agreement between the Missouri Pacific Co. and an individual, by which the latter should assume the payment of the train-men on one of its trains, the company, as in this contract, reserving to itself the control of the train and train-men, and the movements of the train, would render such individual liable for injuries received by one through the negligence of such employees.

FIFTH CLAUSE OF CONTRACT CONSTRUED.

Counsel for appellant cite Kelly *v.* The Mayor, etc., 11 N. Y. 432, and Durst *v.* Burton, 47 N. Y. 167, in support of the proposition that the train-men were acting under the supervision of the Missouri Pacific Co.; that fact would not make them agents of that company. Kelly *v.* The Mayor is an authority against the plaintiff's claim here. There the city of New York had ordered a street to be graded, and contracted with an individual to do the work, and it was held that the city was not liable for damages caused by negligence of workmen employed by the contractor, notwithstanding by the terms of the contract the work was to be done under the direction and to the satisfaction of certain officers of the city. There the city employed another to do its work, reserving the right to have the work done under its direction and to its satisfaction. Here the Missouri Pacific was doing its own work with absolute control of the agencies employed, responsible to no superior for the manner of doing it, and that it hired those agencies from, or that they were gratuitously furnished by another,

cannot alter its relation to passengers or the public, or establish a relation between the passengers or the public, and the corporation or individual furnishing such agencies.

In Durst *v.* Burton, defendants represented an association owning a cheese factory, which they leased to one who contracted to manufacture cheese for them at an agreed price per pound, defendants reserving no right of supervision, but carrying on the business by furnishing the materials and taking and selling the product in the market as an article manufactured by them. And they were held liable for the fraud of their lessee in the manufacture of a lot of cheese sold by them. The difference between that and the case under consideration is too palpable to require more than a statement of the foregoing facts. The defendants there held themselves out to the world as the manufacturers of the cheese, sold it as such, and were, of course, liable in the action brought against them. No analogous facts are found in this record. By no act or transaction did defendant assume to carry passengers or freight from St. Louis to any point on the Missouri Pacific road. The principle invoked by appellant has application only where the party supervising a given work is acting, not as principal, but in subordination to another in whose service he is engaged.

One ground of negligence averred in the petition is the failure to light the depot at Webster, a matter in which defendant had no authority whatever, and we mention it only to show where the doctrine contended for by appellant would lead, for there is no question, if what appellant claims to be the law be conceded, that the defendant would be liable, if the only negligence alleged and proved as causing the injury to the deceased was the failure to have a light at the depot for the benefit of persons getting on or off the train. The court of appeals held that the circuit court erred in refusing an instruction asked by defendant, virtually withdrawing the case from the jury, and we are all agreed that the judgment of the court of appeals should be affirmed, except SHERWOOD, J., absent.

FAILURE TO LIGHT DEPOT.

On Re-hearing.

HENRY, C. J.—We adhere to the opinion heretofore delivered in this cause. It is pertinently asked if two persons sitting on the same seat in a car are injured in a railroad accident, can it be that one must look to one company and his companion to a different company for redress? Why not? In the case at bar the defendant company did not undertake to carry passengers from St. Louis or Pacific to points between those stations. It received no part of the money paid to the Missouri Pacific R. Co. by such passengers. The train was not under his control or management, but under that of the Missouri Pacific. If the general manager

of the defendant had ordered conductor of the train in question not to receive such passengers, and one had entered the car, having a ticket from the Missouri Pacific Co., and the conductor should have been in the act of expelling him from the train, could he have disobeyed an order from the manager of the Missouri Pacific to let the passenger remain? Was not the order from the latter to receive and carry such passengers, one which he was bound to obey? A part of the rolling stock of the train was owned by the defendant. The locomotive was owned by the Missouri Pacific, which also owned the road. The train-men, though in the permanent employment of the defendant, were, while moving the train from St. Louis to Pacific, under the exclusive control and management of the Missouri Pacific, and the engineer and fireman were in the permanent employment of the latter company. Not an order could the defendant company have given as to the running of that train between St. Louis and Pacific. Not a passenger was received by defendant company to be transported between those points. The deceased had purchased his ticket of the Missouri Pacific R. Co.

There were no contractual relations between him and the defendant. The conductor would have subjected the Missouri Pacific to a suit for damages had he ejected the passenger from the train, and would himself have been liable to that company for any damages recovered by the passenger against the Missouri Pacific for such ejection. Could he have sued the St. Louis & San Francisco Co. for such ejection? That company had not undertaken to carry him. It was not doing any such business between St. Louis and Pacific, and clearly he would have had no cause of action against the defendant, but must have sought redress from the Missouri Pacific. Whether to a through passenger who had procured a passage from the defendant company, the latter would have been liable for any injury sustained between St. Louis and Pacific in consequence of the negligence of those operating the train, is not a question in this cause, and it is proper to abstain from deciding that question until it is properly before us. Upon what principle the St. Louis & San Francisco Co. can be held liable in this case I cannot conceive. It certainly would be an anomaly to hold one responsible for the acts of another, over whom he had no control. Such a principle obtains in no civil action between individuals, and no reason can be assigned why it should apply in suits against corporations.

On a critical examination of the cases relied upon to sustain this action it will be found, in such of them as are correctly decided, that there is so marked a distinction between them and this as makes them wholly inapplicable. In every one of them it will be found that the party held liable had some control over the

negligent servants in the very work they were engaged in performing.

The judgment is affirmed. NORTON and BLACK, JJ., dissent.

BLACK, J., dissenting.—For all purposes of this case the negligence of the train-men in the respect alleged in the petition is conceded, so that the only question to be considered is whether under the written contract between the two companies the defendant's train in question, in passing from St. Louis to Pacific, is to be regarded as defendant's train in a sense that makes it liable for the negligence of the train-men. That it is liable, and liable, too, under the terms of the contract, I have no doubt.

If the defendant's train was operated by its servants, it is a circumstance of no moment that the ticket was sold by the Missouri Pacific Co., for upon that ticket the plaintiff's husband was received as a passenger, and as to him the defendant was a common carrier and liable for the negligence of its servants the same as if it had sold the ticket itself. Todd *v.* Ry. Co., 3 Allen, 18; Faulkers *v.* Ry. Co., 42 L. J. N. S. 345. Nor did it make any difference that the defendant was not the owner of the track upon and over which its cars were operated. Steller *v.* Ry. Co., 9 Cent. Law Jour. 131. It would seem to be clear enough that if this train of cars was under the control of the defendant's servants, then the defendant is liable. If under the joint control of the servants of both companies, then both companies are liable. Nashville, etc., R. Co. *v.* Carroll, 6 Heisk. 347; Vary *v.* B., C. R. & M. R. Co., 42 Ia. 246.

The defendant owned and operated a long line of road which terminated at Pacific, some thirty-seven miles from St. Louis, and for the mutual benefit of itself and the Missouri Pacific Co. made the contract in question, whereby the latter undertook to transport defendant's passenger trains and freight cars back and forth between these points over the road of the Missouri Pacific Co. for a stipulated percentage of the gross earnings received by the defendant from all of its passenger and freight business passing over the road of the Missouri Pacific Co., as aforesaid. It is true the manner of running the passenger trains and the control and acts of the train-men while on this part of the road are to be subject to the rules and regulations of the Missouri Pacific Co., and that company is to furnish the locomotives and crews for the same at its own expense, but it clearly provided that the defendant was to furnish, at its own expense, all train-men for the care and management of its trains, and is required to care for the inside of its cars at St. Louis, and to pay all expenses for the use of the Union depot at St. Louis. These train-men, including the conductor, are employed by the defendant, and receive their compensation from the defendant alone. They are the servants regularly in charge of the

train throughout its trip. While the Missouri Pacific Co. may, and does, make the time-table and general rules, these trains are under the immediate control of the defendant's servants.

The evidence in this case shows that the conductor determined how long the train should stop, and gave the signal to start. That it was under his immediate control and direction can scarcely be questioned. Throughout the contract these passenger trains are spoken of as the trains of the defendant. To call these trains the trains of the Missouri Pacific Co. is to disregard the plain stipulations of the contract. Some evidence was offered to the effect that the Missouri Pacific Co. had the power to discharge these train-men so employed by the defendant, but it does not appear that any such power was ever attempted to be exercised, and we can plainly see from the terms of the contract that the Missouri Pacific Co. had no such power. It is for the court, and not for the witnesses, to say what the legal effect of the contract is.

It is said, and there is evidence to that effect, that the defendant objected to carrying these passengers from St. Louis to Pacific and intermediate points, but we do not see what the plaintiff's husband had to do with these controversies; the broad fact remains that defendant did receive these passengers into its cars and discharge them at their destination, and that, too, on these tickets of the Missouri Pacific Company. The defendant, by its conduct, held itself out to receive such persons as passengers, certainly it did do so, and they were entitled to all the protection due to passengers. That the defendant would be liable to those passengers to whom it sold tickets from St. Louis to points beyond Pacific on its line, for negligence of these train-men, cannot, we think, be fairly questioned; yet, to a passenger in the same coach who holds a ticket to Pacific, or some intermediate point, it is contended the defendant owes no duty. That this train was under the immediate control of the defendant's agents, and that they, and they alone, had the right to regulate the conduct of the passengers, and were called upon to look after and care for them as the agents and servants of the defendant, is clear enough from the terms of the contract. For these reasons I dissent from the opinion just filed. Whether the Missouri Pacific Company is not also liable, is a question which we need not consider, for if it is, it does not aid this defence.

NORTON, J., concurs.

Liability in Case of Accident of One Road Running upon the Tracks of Another.—Queen *v.* McLeod, 16 Am. & Eng. R. R. Cas. 301; Patterson *v.* Wabash, etc., R. Co., 18 Am. & Eng. R. R. Cas. 130; Tompkins *v.* Clay St. Hill R. Co., 18 Am. & Eng. R. R. Cas. 144; Smith *v.* St. Paul City R. Co., 16 Am. & Eng. R. R. Cas. 310.

LOWNEY

v.

NEW BRUNSWICK R. Co.

(*Advance Case, Maine. December* 10, 1886.)

The owner of personal property cannot recover for damages thereto by fire, communicated by a locomotive, from the railroad company, except upon proof of negligence on the part of the company, and that the fire was caused by such negligence.

ON motion by the defendant to set aside the verdict.
Madigan & Donworth for plaintiff.
Wilson & Woodard for defendant.

EMERY, J.—If this case were within section 64 of chapter 51 of the Revised Statutes the burden would still be upon the plaintiff to prove that the fire which consumed his sleepers was communicated by the defendant's locomotive engine. The only evidence we find of such a communication is the fact that the fire was discovered in Shaw's barn—from which it spread to the sleepers—within a few minutes after the passage of the engine. It may be doubted if that alone is sufficient proof.

But the case is not within the statute above cited, and the judge so instructed the jury. The instruction was correct. The statute does not include movable articles, that are only temporarily left near the railroad track, and are liable to be changed at any time. Chapman *v.* A. & St. L. R. Co. ,37 Me. 92; Pratt *v.* Same, 42 Id. 579.

The burden upon the plaintiff, therefore, was to prove, not only that the fire was communicated by the engine, but also that the defendants were guilty of negligence, and their negligence was the causeof the communication of the fire. The communication of the fire alone does not import negligence. Nor does the proof of negligence alone import that it was the cause of the fire. The negligence must be proved. Its relation as the efficient cause of the fire also must be proved. Pierce Railroads, 437; Sheldon *v.* Hudson River R., 114 N. Y. 218; s. c., 67 Am. Dec. 155; Bachelder *v.* Heagan, 18 Me. 32; Sturgis *v.* Robbins, 62 Id. 289; Lesan *v.* Maine Cent. R., 77 Id. 85; State *v.* Same, 77 Me. 538.

In this case we find no evidence of such negligence, nor of its casual relation. It is urged in the argument for the plaintiff that the dampers were probably open or warped, or that ignited coals may have been blown out of the ash-pan, or that the smoke-stack might not have had proper appliances to arrest the sparks. We do

not find the evidence of them, however. Indeed, whatever evidence there was upon these points seem to negative the plaintiff's suggestion.

The verdict seems to us clearly against the law and evidence, and it should be set aside.

If it be suggested that it is difficult to prove negligence in such a case, and that the rules of law above stated are a hardship upon the plaintiff, and those situated as he is, it should be remembered that the defendants were pursuing in a lawful manner a lawful business, and one useful to the entire community. It is the general rule of law that one engaged in a lawful business, and acting in a lawful manner, is liable for such injuries only as are caused by his negligence. In some actions against individuals it may be difficult to prove that the defendant was negligent, and that his negligence caused the injury, but that difficulty would be no good reason for changing the rule. Bachelder *v.* Heagan, and Sturgis *v.* Robbins, *supra.*

Verdict set aside. New trial granted.

PETERS, Ch. J., WALTON, DANFORTH, FOSTER, and HASKELL, JJ., concurred.

DIAMOND

v.

NORTHERN PACIFIC R. Co.

(*Advance Case, Montana. February* 2, 1887.)

In actions for damages against a railroad company resulting from sparks or fire emitted or scattered by one of the defendant's engines, it is competent for plaintiff to show that, about the time when the fire took place, fire was scattered by an engine or engines of defendant's, without predicating such engine to be the one which occasioned the fire in question.

In an action for damages against a railroad company for a fire occasioned by sparks from one of its engines, it is misleading to charge the jury simply that the railroad company was bound to use the reasonable care and diligence of an ordinarily prudent man, in preventing the escape of fire, and in keeping its right of way clear of combustible material, unless accompanied by an explanation that the care required is the ordinary care of an expert engineer or railroad servant.

Under Laws Mont. 1881, p. 71, § 7, enacting that railroads running through the Territory shall keep their right of way free from dead grass, weeds, or any dangerous or combustible material, it is as much the duty of a railroad company to so keep its right of way as it is to use proper means to prevent the emission of sparks of fire, and such law does not trench upon the chartered right, under act of Congress, of such a railroad company.

In action against railroad companies for damages resulting from sparks of

fire from a locomotive, negligence will be presumed from proof of the accident and the injury, and this applies to chartered as well as to other railroads.

APPEAL from first district, Custer county.

Action by William Diamond, respondent, against the Northern Pacific Railroad Co., appellant, for damages for fire.

Wilbur F. Sanders for appellant.

Andrew F. Burligh for respondent.

WADE, C.J.—In this action the respondent seeks to recover damages for the loss by fire of certain young trees, timber, buildings, fences, hay, and other property, described in his complaint, which fire he alleges was occasioned by the negligence of the appellant in not keeping its track and right of way, which passes near to the premises of the respondent, free from dead grass, weeds, and other combustible materials, and in not providing suitable spark-arresters, and other machinery, in operating its road, and by negligence and carelessness of its officers in managing the same.

FACTS. There was a general verdict in favor of the respondent, and with it the jury returned certain special issues which had been submitted, and which are as follows: "(1) How did the fire complained of by plaintiff originate?—Answer. By fire from some train belonging to the defendant. (2) If you find that the fire came from the railroad, by what train was the same started?—A. Said fire was started by a train which passed over the railroad of the defendant, adjacent to the property of the plaintiff, about the hour of 2 o'clock P.M. on August 11, A.D. 1882. (3) Did the fire originate from any fault or neglect on the part of the railroad company, and, if so, in what did such negligence consist?—A. Yes, by failing to keep its right of way free from dead grass. (4) Was there sufficient grass on defendant's right of way, or dry weeds and other combustible material, to make it apparent to a person of ordinary prudence that there was danger of fire therefrom in the neighborhood of plaintiff's ranch?—A. There was. (5) Did the failure of plaintiff to remove dry grass, or other combustible material, on his own premises, contribute in any degree to his loss?—A. It did not."

There was no exception or objection to the testimony introduced before the jury, and upon which the foregoing findings and special issues were based, except the following: The witness, Mrs. Earnest, was asked the following question: "If you know, you may state whether or not you knew of other fires occurring on the line of defendant's road in the vicinity of Mr. Diamond's ranch about the time, or within a week or two, of the fire in question, caused by sparks from different locomotives,"—to which there was an objection by defendant, overruled, and an exception taken, and the witness answered as follows: "Yes. Yes; I saw sparks coming

out of the smoke-stacks, and, after the train passed, I saw smoke. I saw hay burn once before the time of the fire at Diamond's ranch." And the following to another witness: "Do you know anything about the trains passing over that road about the first day of August?" to which there was an objection by defendant, overruled, and an exception, and the witness answered as follows: "I know of trains passing over defendant's road about the first day of August, by which fire was scattered. This was not at the Diamond place, but this side, and a mile or two from Diamond's. I know of three times that fires were set by passing trains,—two on the hill, and one this side of it."

As to the competency of this class of evidence, Mr. Thompson, in his valuable work on Negligence, says: "The business of running railroad trains suggests a unity of management, and a general similarity in the construction, of the engines. For this reason and on account of the difficulty of proving negligence in these cases, as before pointed out, the admission of evidence as to other and distinct fires from the one alleged to have caused the injury is permitted. This rule is adopted in England, and prevails in all the States, with one, or possibly two, exceptions. More particularly, it may be stated as follows: That, in actions for damages caused by the negligent escape of fire from locomotive engines, it is competent for the plaintiff to show that, about the time when the fire in question happened, the trains which the company were running past the location of the fire were so managed in respect to their furnaces as to be likely to set on fire objects in the position of the property burned, or to show the emission of sparks or ignited matter from other engines of the defendant passing the spot, upon other occasions, either before or after the damages occurred, without showing that they were under the charge of the same driver, or were of the same construction, as the one occasioning the damage. . . . Evidence of this character is admitted for two purposes: First, to show the cause of the injury; second, to show negligence in the construction or working of the particular engine which caused the damage." Thomp. Neg. 159, and cases cited. COMPETENCY OF EVIDENCE.

If, within a reasonable time before or after the fire in question, other fires had occurred in a similar manner, these would be circumstances tending, in some degree, to show either carelessness and negligence in the management of the engines, or that they were not properly constructed; and such other fires would show a want of vigilance on the part of the company.

In the case of Longabaugh *v.* Virginia, etc., R. Co., 9 Nev. 271, the court says: "What are the facts in the case? Plaintiff's wood caught fire in some manner to him at the time unknown. How did the fire originate? This was the first question to be established in the line of proof. Positive testimony could not be found. The

plaintiff was compelled, from the necessities of the case, to rely upon circumstantial evidence. What does he do? He first shows, as in the New York case, the improbabilities of the fire having originated in any other way except from coals dropping from the defendant's engines. He then shows the presence, in the wood-yard, of one of the engines of defendant, within half an hour prior to the breaking out of the fire. Then proves that fires have been set in the same wood-yard, within a few weeks prior to this time, from sparks emitted from defendant's locomotives. I think such testimony was clearly admissible, under the particular facts in this case, upon the weight of reason as well as of authorities. . . . Upon the question of negligence, it was admissible, as tending to prove that if the engines were, as claimed by defendants, properly constructed, and supplied with the best of appliances in general use, they could not have been properly managed, else the fires would not have occurred." Proof of fires, covering a period of four years, was admitted in that case; and the following language, in the case of Field *v.* New York, etc., R. Co., 32 N. Y. 339, was cited and approved: "The more frequent these occurrences, and the longer time they have been apparent, the greater the negligence of the defendant; and such proof would disarm the defendant of the excuse that, on the particular occasion, the dropping of the fire was an unavoidable accident."

In the case of Grand Trunk R. Co. *v.* Richardson, 91 U. S. 454, the supreme court of the United States holds the same doctrine. In that case the plaintiff was allowed to prove that, at various times during the same summer, before the fire occurred, some of the defendant's locomotives scattered fire when going past the property destroyed, without showing that either of the locomotives which it is claimed caused the fire was among the number, and without showing that the former locomotives were similar in their make, state of repair, or management to the latter ones. The court, by Mr. Justice Strong, said: "The question, therefore, is whether it tended in any degree to show that the burning of the bridge, and the consequent destruction of the plaintiff's property, was caused by any of the defendant's locomotives. The question has been often considered by the courts in this country and in England, and such evidence has, we think, been generally held admissible, as tending to prove the possibility, and consequent probability, that some locomotive caused the fire, and as tending to show a negligent habit of the officers and agents of the railroad company. There are, it is true, some cases that seem to assert the opposite rule. It is, of course, indirect evidence, if it be evidence at all. In this case it was proved that engines run by these defendants had crossed the bridge not long before it took fire. The particular engines were not identified, but their crossing, at least, raised some probability, in the absence

of proof of any other known cause, that they caused the fire. And it seems to us that, under the circumstances, the probability was strengthened by the fact that some engines of the same defendants, at other times during the same season, had scattered fire during their passage;" citing Piggot *v.* Railroad Co., 3 Man. G. & S. 229; Sheldon *v.* Railroad Co., 14 N. Y. 218; Field *v.* Railroad Co., 32 N. Y. 339; Webb *v.* Railroad Co., 49 N. Y. 420; Cleaveland *v.* Railroad Co., 42 Vt. 449; Railroad Co. *v.* McClelland, 42 Ill. 358; Smith *v.* Railroad Co., L. R. 6 C. P. 22.

In Shearman & Redfield on Negligence, p. 491, it is said: "Evidence that sparks and burning coal were frequently dropped by engines passing on the same road, upon previous occasions, is relevant and competent to show habitual negligence, and to make it probable that the plaintiff's injury proceeded from the same quarter."

In Atchison, etc., R. Co. *v.* Stanford, 12 Kan. 354, it is said: "The engines are all alike to him. He does not know them apart, nor does he know when any particular engine is used, or who manages it; and, when it passes at the rate of fifteen or twenty miles an hour, he could not see enough of it to afterwards identify it. What the engine is, and how it is managed, is peculiarly within the knowledge of the company." "The plaintiff is not, therefore, bound to prove which one of the defendant's engines sent out the fire." Bevier *v.* Delaware, etc., Co., 13 Hun, 254.

These authorities, and others that might be cited, seem to settle the proposition that, in actions of this character, it is competent for the plaintiff to show the emission of sparks or ignited matter from other engines of the defendant, passing the spot upon other occasions, either before or after the damage occurred for which the action is brought, without showing they were under the charge of the same driver, or were of the same construction, as the one occasioning the damage; and therefore that the testimony in question was competent, and properly admitted. There were no other objections to the testimony given to the jury on the trial. The special findings of the jury are supported by the evidence. They have the force and effect of a verdict, and cannot be disturbed by an appellate court, if there is evidence to support them. They are conclusive upon us; and in the further consideration of the case, and of the rights of the parties thereto, we must consider the fact established that the damage of which the plaintiff complains, and which the jury found, was caused by fire from some train belonging to the defendant company; that said fire was started by a train that passed over the railroad adjacent to the property of the plaintiff, on the eleventh day of August, 1882; that said fire originated from the negligence of the defendant in failing to keep its right of way free from dead grass; and that

there was sufficient dead grass, weeds, and other combustible material on said right of way to make it apparent to a person of ordinary prudence that there was danger of fire therefrom, in the neighborhood of plaintiff's ranch. All of these facts were found by the jury upon testimony to which the defendant did not object, except to the two questions and answers above stated, and which objections, as we have seen, were not well taken.

The statute of the Territory prescribing the duty of railroads, as to keeping their track and right of way free from dead grass, weeds, or other dangerous or combustible material, is found in the Laws of 1881, p. 71, and is as follows:—

"Sec. 7. It shall be the duty of all railroad corporations or railroad companies, operating any railroad in this Territory, to keep their railroad track, on either side thereof, for a distance on each side of the track or road-bed, so far as it passes through any portion of the Territory of Montana, free from dead grass, weeds, or any dangerous or combustible material; and any railroad company or corporation so failing so keep their railroad track free and clear as above specified, and each side thereof, shall be liable for any damages which may occur from fire emanating from any operating railroad; and a neglect to comply with the provisions of this act, in keeping clear any railroad track, and either side, for a distance equal to the space of ground covered by the grant of the right of way for the railroad company, provided that the same does not exceed one hundred feet on each side of the road-bed, shall be *prima facie* evidence of negligence on the part of any railroad corporation so operating any railroad within the Territory of Montana."

STATUTORY DUTY OF RAILROADS.

The jury found, as fact, that the fire in question came from one of the defendant's trains, and was caused by the neglect of the defendant in failing to keep its right of way free from dead grass, and that there was sufficient thereof, on said right of way, in the vicinity of defendant's ranch, to make it apparent to a person of ordinary prudence that there was danger of fire therefrom. Such neglect, under the statute, made a *prima facie* case of neglect against the company. When such a case is made against a defendant, he is called upon to rebut the presumptions and conclusions therefrom arising. Under the statute, proof of the fire, and the failure of the company to keep its right of way free from the combustible materials therein named, in the vicinity thereof, makes a *prima facie* case against the company, and the burden then is upon it to show that it was not at fault.

PRIMA FACIE CASE.

In the management and operation of its road, it was as much the duty of the company to keep its track and right of way free and clear of dead grass, weeds, or other combustible material, and the care in this regard should be just as great, as in providing

suitable machinery, equipments, and officers and employees for its road. Negligence in this respect would render it liable, even though its appliances were proper, and though it were guilty of no negligence in allowing the fire to escape. Says Mr. Thompson: "A railroad company is bound to keep its track and contiguous land clear of materials likely to be ignited from sparks issuing from its locomotives, and neglect of these precautions will render it liable, even though its appliances were proper, and though it were guilty of no negligence in allowing the fire to escape. This is a duty which is implied in the grants to corporations to use locomotive engines. A franchise of this nature must be strictly construed; and it would be unreasonable to presume that, in granting the privilege to use this dangerous agent, the legislature intended to give them the privilege of running their engines on premises surrounded and covered with combustible materials. The removal of such combustible substances is quite as much a means of preventing the communication of fire from their locomotives as the use of inventions for preventing the escape of fire from the locomotives themselves." Thomp. Neg. 162; Salmon *v.* Delaware R. Co., 38 N. J. Law, 5; Delaware, etc., R. Co. *v.* Salmon, 39 N. J. Law, 299; Kellogg *v.* Chicago, etc., R. Co. 26 Wis. 223; Toledo, etc., R. Co. *v.* Wand, 48 Ind. 476; Burlington, etc., R. Co. *v.* Westover, 4 Neb. 268; Henry *v.* Southern, etc., R. Co., 50 Cal. 176; Pittsburgh, etc., R. Co. *v.* Nelson, 51 Ind. 150.

DUTY TO KEEP RIGHT OF WAY CLEAN.

Nor is the ignition of combustible material on the track or right of way of a railroad, by sparks dropped from passing trains, unavoidable accident. The removal of the combustible material from the road or right of way is an obvious and sure precaution. Flynn *v.* San Francisco & S. J. R. Co., 40 Cal. 19.

The defendant derives its authority from an act of Congress. It is the owner of a chartered right, and this right cannot be abridged or invaded by territorial legislation. But the grant of a franchise or privilege to use a dangerous agent carries with it the corresponding duty to so use and exercise the same as not to infringe upon the rights of others. The more dangerous the agent, the higher the degree of care required. Section 7 of our statute, above quoted, imposes no greater burdens than are imposed by the grant to the defendant. The duty goes with the privilege.

The findings of fact having been made upon unobjectionable testimony, as we have seen, such findings are conclusive upon us, and of the case, providing there were no errors of law in the instructions given to the jury, by which their verdict was influenced. The theory of the defendant, as shown in its requests to charge, is that railroad companies are only bound to exercise a reasonable care and diligence to prevent fire and sparks from escaping from their locomotives while running on their

"ORDINARY CARE."

roads, and in keeping their tracks free and clear from combustible material; and that reasonable care and diligence is such as an ordinarily prudent man would, under like circumstances, observe to prevent injury to his own property, if equally exposed. This theory entirely loses sight of the requirement that the "ordinarily prudent man," of which it speaks, must be skilled in the particular business; and, according to that theory, an engineer would fill all the requirements if he was a man of ordinary prudence, but entirely ignorant of mathematics and engineering. But if the theory, as stated, were correct, it would, without explanation, be misleading. The expression "ordinarily prudent man," or "ordinary care," without qualification, suggests merely the care that should be bestowed in cases of "ordinary" danger. They are expressions inappropriate, where the danger is extraordinary, unless they are explained and applied to the subject. If the danger is great, the care should be great in proportion. The ordinary care of an engineer on a railroad locomotive is a very high degree of care, and the skill required is a very high degree of skill. Such an engineer is the "ordinarily prudent man" of his class, and the phrase, thus explained, would be correct.

The use of locomotive engines, even when carefully managed, is known to be dangerous; and this fact alone devolves upon those using them as a motive power a high degree of care. But this term is relative; and ordinary and reasonable care—which is, after all, the most that the law requires—means, when used in this connection, that degree of care which prudent men, skilled in the particular business, would be likely to exercise under the circumstances. The care must be proportionate to the danger. What is ordinary care in a case of extraordinary danger would be extraordinary care in a case of ordinary danger, and what would be ordinary care in a case of little danger would be much below this in case of great danger. Thomp. Neg. 152, and cases cited.

Says Wharton: "It is enough for us to fall back upon the essential principle that lies at the base of this branch of the law, that the diligence to be exacted from a specialist is the diligence which good specialists in his department are accustomed to bestow." Neg. § 872. Shearman & Redfield on Negligence, § 477, says: "It is the duty of a railroad company to take such precautions against danger as the magnitude of the peril demands. The ordinary care to be used in the management of a railroad may, therefore, and sometimes does, require the precautions which, if used in any business involving less risk, would be deemed equivalent to the utmost care." And, while it would be error to charge a jury that the utmost care is required, still the use of the phrase "ordinary care," with no explanation or application of its meaning, would tend to mislead the jury. It is a phrase applicable to a variety of situations, and imposes duties and obligations accord-

ingly. It means one thing as to one case, and a different thing as to another, and in every case the jury ought to be told what degree of care is required. It might be a very high or a very low degree, and this in every case would depend upon the danger. A man must exercise "ordinary care" in conducting a dray through the streets, and also in conducting a train on a railroad, but the degrees of care thus required would be wide apart. Each would be a specialist in his own department, and each would be required to bestow the care and skill that the danger required.

There was no testimony in the case tending to show that the defendant used ordinary or any care whatever in keeping its track and right of way free from dead grass and weeds, while the jury found as a fact that there was sufficient of such combustible material on said right of way to make it apparent to a person of ordinary prudence that there was danger of fire therefrom in the neighborhood of plaintiff's ranch, and that by the neglect of the defendant in failing to clear away said material the fire occurred. If there was neglect in this regard, whereby the fire occurred, and the damage was done, it was not very material how perfect and complete the road was equipped in other respects, or how faithful and efficient were its officers.

The defendant also requested the court to instruct the jury as follows: "You cannot presume negligence by reason of the fact (if it is a fact) that the fire complained of by plaintiff occurred and had its origin from one of the defendant's locomotives, but you must further find, from the testimony, a want of ordinary care, as I have defined it, on the part of the defendant, in one or more of the matters mentioned in the complaint." But the court refused this request, and on this subject charged as follows: "If it has been proven to your satisfaction that the fire was caused by sparks or fire emitted from an engine of the defendant, that fact is *prima facie* evidence of negligence on the part of the defendant, and such proof as to the fire, and of the consequent injury, entitles the plaintiff to recover damages for the losses caused thereby, if nothing more be shown on either side; and therefore throws the burden of proof on the defendant to show, by way of rebuttal, that at the time of the alleged injury the engine was equipped with the necessary and most effective appliances to prevent the escape of fire, and was not only in good repair, but was properly, carefully, and skilfully handled by a competent engineer." PRESUMPTION—REBUTTAL.

The gist of this action is negligence, and ordinarily in such cases the burden of proving negligence is upon the party who alleges it. The doctrine is now undisputed, both in England and America, "that when the legislature has sanctioned and authorized the use of a particular thing, and it is used for the purpose for which it was authorized, and every reasonable precaution is observed to prevent injury, the sanction of the NOT NEGLIGENCE TO USE ENGINE.

legislature carries with it this consequence, that, if damages result from the use of such thing, the party using it is not responsible. Therefore, in the case of railroads authorized to propel their cars by steam, the gist of their liability for injuries caused by the escape of fire is negligence. This is now the law of England, and of every State in the Union, except where altered by statute." Thomp. Neg. 152, and authorities cited in note.

But there are cases where negligence will be presumed from proof of the accident and the injury, and fires caused by steam-engines seem to come within this class. This is a presumption arising from necessity, and that justice may not be defeated. Fire escapes from an engine and destroys property. The owner only knows that his property is gone, and that the fire causing its destruction came from the engine. He might not know, or be able to prove, from what particular engine on the line of a railroad the fire escaped, or who at the time was in charge of it, or whether it was properly constructed, and so not be able to prove negligence, when, in fact, it did exist. All this proof is in possession of the railroad company, and it has the power of rebutting the charge of negligence, if none in fact, existed. "The rule, in cases of ordinary fire, that the destruction of property by this means does not of itself raise a presumption of negligence, finds an exception in the case of fires caused by steam-engines. All information as to the construction and working of its engines, and of the particular one in fault, is in the possession of the company, as are also the means of rebutting the charge of negligence entirely in its power. An outsider can hardly be expected to prove that in the construction of the engine, or in the use of it, at the time the injury occurred, the company was guilty of negligence. He can only prove that his property was destroyed by one of the company's locomotives; and, having done this, it is but proper to call on the defendant to show that he was not negligent; that he employed careful and competent servants, and that he had used the most improved appliances to prevent the escape of fire from his engines. These considerations have induced the courts of England, of Missouri, of Illinois, Tennessee, Wisconsin, Nebraska, Nevada, and perhaps Minnesota, to adopt the preinmption of negligence from proof of the escape of fire from a locomotive. On the other hand, in Connecticut, Indiana, New York, Kansas, Pennsylvania, California, North Carolina, Delaware, Iowa and Ohio, some additional evidence is required of the plaintiff." Thomp. Neg. 153, and authorities cited.

PRESUMPTION OF NEGLIGENCE.

The situation of the plaintiffs in such cases might, and very likely would, render it impossible for them to furnish any additional proof, and thereby the defendants might escape the payment of damages that their neglect had caused. It is no hardship on railroad companies to prove that they have not been negligent, if

such is the fact. They have all the proof in their possession. It is no injustice to them to be required to show how their engines are equipped, and the care and skill bestowed by their officers and employees, while it would be a hardship and an injustice for the person whose property has been destroyed, in his absence perhaps, by fire from an engine, to show any of these things. The presumption of negligence against defendants, and in favor of plaintiffs, in such cases, seems to be a presumption arising from the necessities of the situation, and that justice may not fail.

Judge Cooley, commenting on this subject, says: "Often the injury itself affords sufficient *prima facie* evidence of negligence. Thus, if the buildings of individuals are destroyed by fire originanating in sparks from a locomotive, the fire itself is held to be evidence of negligence, which requires to be overcome by some showing that the railway company provides suitable precautions against such an occurrence. Every lawful business is supposed capable of being carried on in a manner that will be consistent with safety to the business and property of others. All police rules, whether constituting a part of the common law or imposed by statutes, must assume that this is practicable. The construction of railroads could not be permitted, if their trains must necessarily run across the country, scattering fire and destruction along their way. But experience shows that this may be avoided by the exercise of reasonable care. Reasonable care, in such a case, is unquestionably a high degree of care, because the risk of injury, where care is not observed, is very great, not to one person, merely, but to whole communities of persons along the line of the road. There is consequently nothing unreasonable in presuming negligence from the occurrence of an injury, and calling on the railroad authorities to rebut the *prima facie* case, by showing that they take reasonable care, in the selection and management of their machines, to prevent such injury occurring." Cooley, Torts, 661.

Prof. Wharton, who takes the opposite view, and declares that when a company is chartered, and thereby lawfully uses fire in its engines, the true doctrine is that it rests on a plaintiff, suing it for fire communicated from its engines, to show negligence in the company, also says that it is a mistake to suppose that negligence can be only proved by positive affirmative evidence, and that it is not necessary for the plaintiff to do more than show such circumstances as from the nature of things lead to the inference of negligence as the most probable hypothesis by which the injury can be explained. Whart. Neg. §§ 870, 871.

The fact that a company is chartered, and has the lawful right to use fire in its engines, does not give it the right to injure the property of others. It accepts its charter with the implied understanding that it will so use the right or franchise conferred as not to infringe upon the rights of others. The property of one man

cannot be imperilled by giving a charter to another. Men do not own their property subject to any such right, unless it is lawfully taken, upon just compensation, and condemned to a public use. All the authorities agree, in the case of an unchartered company, if the plaintiff shows that his property caught fire from the defendant's engine, the burden is on the defendant to disprove negligence, and there is no reason for applying a different rule to a chartered company. Each alike own their property, and each are required to so use their own as not to injure the property of others. This is implied whenever a charter is granted. It is a part of the contract, and, if it were not, the granting of a charter would be the imposing of burdens upon the private property of individuals—the condemning of such property without just compensation. Any man, or company of men, may purchase the right of way, and construct and operate a railroad. It is a lawful business. Another company may procure a charter, and do the same thing; and, in case of damage and injury to adjacent property, by fire from the engines of either company, there ought not to be any difference in the rule of evidence, or in the burden of proof, when a plaintiff comes to sue for such damage.

COMPANY HAS NO RIGHT TO FIRE PROPERTY.

The statute of the Territory, requiring railroad companies to keep their track and right of way free from dried grass, weeds, or other combustible material, should receive a reasonable construction. It is a matter of common observation that generally, in Montana, the right of way of railroads has upon it more or less dried grass and weeds; but if the quantity is not sufficient to indicate danger from fire, to common prudence and ordinary care, then no liability could arise therefrom. The instructions, as given, cover this proposition.

There is no complaint that the instructions as given are contradictory or inconsistent, and we find no error in those given, or in failing to give those refused.

Judgment affirmed, with costs.

Evidence in Fire Cases.—No presumption of negligence from mere setting on fire. Babcock *v.* Chicago, etc., R. Co., 11 Am. & Eng. R. R. Cas. 63. Fact that same engine repeatedly set on fire may go to jury. Sloeson *v.* Burlington, etc., R. Co., 11 Am. & Eng. R. R. Cas. 67. For other cases as to evidence in action against railroad companies for negligent fires, see Gulf, etc., R. Co. *v.* Holt, 11 Ib., 72; Mo. Pac. R. Co. *v.* Kincaird, 11 Ib. 83; Johnson *v.* Chicago, etc., R. Co., 13 Ib. 460; Gibbons *v.* Wisconsin Valley R. Co., 13 Ib. 469; Babcock *v.* Chicago, etc., R. Co., 13 Ib. 477.

Definitions of "Negligence," Ordinary Care," etc.—See Jameson *v.* San Jose, etc., R. Co., 3 Am. & Eng. R. R. Cas. 350; Brown *v.* Congress, etc., R. Co. 8 Ib. 383; the term "culpable negligence" is held to be used in the same sense as blameable negligence. Peoria, etc. R. Co. *v.* Clayburg, 15 Am. & Eng. R. R. Cas. 356.

It is Negligence to Leave Combustible Material on Right of Way.—Louisville, etc., R. Co. *v.* Spenn, 11 Am. & Eng. R. R. Cas. 60; same *v.* Ehlert, 11 Am. & Eng. R. R. Cas. 61; Pitts., etc., R. Co. *v.* Jones, 11 Am. & Eng. R. R. Cas. 76; Indianapolis, etc., R. *v.* Adamson, 11 Am. & Eng. R. R. Cas. 56; same *v.* McBrown, 13 Am. & Eng. R. R. Cas. 408.

What Makes out a Prima Facie Case of Negligent Fire set by Engine—Nonsuit.—In Sheldon *v.* Hudson R. Co., 14 N. Y. 218, the evidence was held to require the submission of the case to the jury. In that case it is said, in the leading opinion, that evidence of the throwing of sparks and coals of large size from defendant's engines, and further than the building burned, had a bearing on both branches of the case which the plaintiff undertook to establish, viz., that the fire was communicated from defendant's engines, and that there was something unsuitable and improper in the construction of the engine which caused the fire. The opinion is also expressed that evidence of this character is "competent *prima facie* evidence for a person seeking to establish the responsibility of the company for a burning." In Field *v.* N. Y. C. R., 32 N. Y. 344, defendant contended that similar evidence was not sufficient to carry the case to the jury, upon the question of negligence. The trial judge differed with him and declined to nonsuit, saying that "the evidence rendered it not only probable, but reasonably certain, that the injury occurred from fire scattered by defendant's locomotives," and further that "the fact that the sparks or coals were scattered at all on the roadway in such quantities as to endanger property on abutting premises, raised an inference of some weight that the engines were improperly constructed or managed." It was also said that "it was legitimately to be inferred from these facts, that the scattering of these coals of fire from defendant's engines which were found upon their track, and which produced the injury, was the result either of defectiveness in the machinery or neglect in repairing it." "There was enough, therefore, in the evidence given of this character to justify submission to the jury of the question whether the injury complained of was caused by the negligent conduct of the defendant." Field *v.* N. Y. C. R., 32 N. Y. 346.

The doctrine of the above cases that the evidence given in this case is quite sufficient to require the questions of firing and of negligence, whereby plaintiff's barn was destroyed, to be given to the jury, has been approved and followed in many similar cases. Bedell *v.* L. T. R., 44 N. Y. 369; Christ *v.* Erie R., 1 N. Y. S. C. (T. & C.) 435, 436; s. c. affirmed Ct. of Appeals, 58 N. Y. 638; Hinds *v.* Barton, 25 N. Y. 544, 546; Westfall *v.* Erie R., 5 Hun, 75, 4th Dept; Lee *v.* N. C. R., 8 N. Y. Week. Dig. 111; Home Ins. Co. *v.* P. R., 11 Hun, 184; Bevier *v.* D. & H. Co. 18 Hun, 254, 4th Dept.

Elementary writers and other authorities hold that proof of destruction of property by fire escaping from a locomotive raises a *prima facie* case of negligence, which the defendant must rebut by showing absence of negligence. Addison on Torts, sec. 355; Cooley on Torts, 661, 662; Piggott *v.* East. R. Co., 3 C. B. (M. G. & S.) 229; Couls *v.* Han. R. Co., 60 Mo. 227; Spaulding *v.* Chicago R. Co., 30 Wis. 110; St. Louis R. Co. *v.* Montgomery, 39 Ill. 335; Burke *v.* L. R. Co., 7 Heisk. (Tenn.) 451.

Evidence of other Fires on Same Day.—The court should not permit plaintiff to introduce evidence of other fires occurring in the neighborhood of the railway the same day as that on which the plaintiff's property was destroyed by fire without some evidence that such fires were occasioned by the particular engine in controversy. 1 Redfield on Railways, 3d Ed. 455; Balt. & Susque. R. *v.* Woodruff, 4 Md. 242; Cole *v.* H. & St. Joe R. Co. 60 Mo. 233; Lester *v.* K. C., St. Jo. & Council Bluffs R. Co., 60 Mo. 265. As remarked in one case, "If, then, the engine which set out the fire was in proper condition, it mattered not that every other engine owned by the company was without proper appliances to prevent the ejection of coals and

sparks. On the other hand, if this engine was dangerous in this respect, it was of no consequence that all the others on the road were safe. Such being the case it is manifest that evidence going to prove defects in engines belonging to the company, other than the one alleged to have produced the injury complained of, was irrelevant to the issue pending and should have been excluded." Erie Railroad *v.* Decker, 78 Pa. St. 295.

Evidence as to Fires should be Confined to the Issue as made by the Pleadings.—If the issue made by the pleading is solely whether the defendant was guilty of negligence in allowing its right of way to be covered with dry grass and other combustible matter, the court's instructions should have been confined to this. Ely *v.* St. L., K. C. & Northern, 77 Mo. 34; Buffington *v.* R., 64 Mo. 246; Eden *v.* H. & St. Jo. R. Co., 72 Mo. 212; Bell *v.* H. & St. Jo. R. Co., 72 Mo. 50; Price *v.* H. & St. Jo. R. Co., 72 Mo. 416; Waldhier *v.* H. & St. Jo. R. Co., 71 Mo. 514; Kenney *v.* H. & St. Jo. R. Co., 70 Mo. 252; Carson *v.* Cummings, 69 Mo. 325; Bank *v.* Murdock, 62 Mo. 70; Weil *v.* Green Co., 69 Mo. 281.

Whether an Adjacent Property Owner is Negligent in Stacking his Grain near Railway.—While it is true that the fact that the plaintiff takes no precautions whatever to protect his stacks of wheat and other property which were destroyed by fire does not of itself constitute negligence, *per se*, on his part, still whether it amounts to negligence or not directly contributing to the injuries complained of, is a question of fact to be determined by the circumstances of the case, and should be submitted to a jury. Carson *v.* Milwaukee & St. Paul R., 7 Am. & Eng. R. R. Cas. 501; Linzee *v.* Winona & St. Peters R., 29 Minn. 411; Kansas Pacific R. Co. *v.* Brady, 17 Kan. 380; Kessee *v.* Chicago & Northwestern R. Co., 45 Wis. 222; Ross *v.* Boston & Worc. R. Co., 6 Allen, 87; Birge *v.* Gardener, 19 Conn. 507; O. & M. R. *v.* Shonefelt, 47 Ill. 591; Erie R. Co. *v.* Dicks, 78 Pa. St. 295; Brown *v.* Hamilton & St. Jo. R. Co., 37 Mo. 297; Mo. Pac. R. Co. *v.* Cornell, 11 Am. & Eng. R. R. Cas. 56; Kansas City, Fort Scott & Gulf R. *v.* Owen, 25 Kan. 420; Chicago & Northwestern R. Co. *v.* Simonson, 25 Ill. 504; Murphy *v.* Chicago & Northwestern R. Co., 45 Wis. 222; s. c., Am. R. Rpt. 33; Collins *v.* N. Y. Central & Hudson River R., 5 Hun, (N. Y.) 477; s. c., affirmed 71 N. Y. 609. "While the owner of land has the right to stack his grain or hay on his premises adjoining to a railway, and thereby only takes the risk of accident by fire not occasioned by the company's negligence; yet if he is guilty of negligence himself, in not ploughing around the stacks or in omitting to do such acts as would have protected his property and prevented the loss, then it would be a case of contributory negligence." Kessee *v.* Chicago & Northwestern R. Co., *supra*. "Where there is evidence of contributory negligence on the part of the plaintiff it should be submitted to the jury. Collins *v.* N. Y. Central & Hudson River R. Co., *supra*. It was a proper case to be submitted to practical men, having all the facts before them, to determine whether due care had been exercised by the plaintiff." Ross *v.* R. Co., *supra*.

Murphy *v.* Chicago & Northwestern R. Co., *supra*, was a decision which carefully considered at length the question of plaintiff's contributory negligence, and in which the court reviewed the previous decisions in Wisconsin and of other courts, and after a careful discrimination and consideration laid down in cases of this character the following rule:—

"Whilst we do not intend in this case to overrule any case heretofore decided in this court . . . we do intend to hold, and do hold, that the doctrine of contributory negligence on the part of the plaintiff is applicable to the case at bar as well as to all other cases where recovery is sought to be had on the ground of the negligent acts of the defendant: and we further hold that the negligent and careless acts of plaintiff upon his own land adjoining the railroad, although such acts may be in themselves lawful, may amount to contributory negligence according to circumstances.

"In other words, if the jury to whom the facts are submitted thinks that his property would not have been destroyed if plaintiff had used that care to maintain and use his property that men of ordinary prudence would do under like circumstances, then the plaintiff cannot recover, and we see no reason why a man who recklessly or carelessly exposes his property to destruction by fire in the immediate vicinity of a railroad, which from necessity of the case must use the dangerous element in carrying on its business, is, as a general rule, to be protected, if by the use of ordinary care he could have avoided its destruction, any more than a man who recklessly or carelessly places his property on the track and it is thereby destroyed."

In O. & M. *v.* Shonefelt, *supra*, the court say: "We are at a loss to perceive why a railroad should be required to mow grass from its right of way and the adjoining owner be permitted to allow his land to become foul and liable to ignite; on the contrary, both should be required to use all reasonable efforts to prevent the escape and spread of fire.

In Brown *v.* Hannibal & St. Jo. R. Co., *supra:* "If the plaintiff negligently allowed dry grass and weeds to accumulate by the wind against the trees in his orchard near the railroad, it should be left to the jury to say whether here was any negligence that contributed to cause the damage."

In Coats *v.* M. K. & T. R., *supra*, the basis of the action was the alleged negligence and carelessness on the part of the employees of the defendant company in setting fire to dry grass near the property of plaintiff; in that case the court say: "If the railway company ought to have the grass in and around the track burned, so ought persons who are so immediately on the road to take the necessary precaution. Whether a party is guilty of negligence or not is a question of fact for the jury and not a question of law for the court to decide when the evidence tends to establish such negligence, and in view of the manner in which the trees in the orchard were wrapped, the character of the mulching thrown around them and other grass and cornstalks left in the orchard, the question whether plaintiff was guilty of negligence or not ought to have been submitted to the jury." Mo. Pac. R. Co. *v.* Brady, *supra*.

"Why should not all men in the vicinity of railroads be required to make the same preparation for negligent fire as well as for accidental fire? Why shoulk they not be required to make such reasonable preparations to avoid losses from fire as reasonable and prudent men in the same vicinity usually and ordinarily do? Do not all reasonable and prudent men in the transaction of their own affairs make some preparation for negligence of others as well as for accidents? . . . There was evidence tending to show that they (plaintiffs) were negligent, and the question of whether they were or not should have been submitted to the jury, but it was not submitted to the jury, and in this we think the court below erred.

"The plaintiffs should have exercised that degree of diligence to avoid injury to their property if fire escaped from defendant's engines which ordinary prudent men would exercise under like circumstances. There was some evidence tending to show that the plaintiffs below were negligent, and the railway company had a right to have its case submitted to the consideration of the jury under proper instructions. The error of the court was material. Whether the owner of the hay was guilty of negligence was a question of fact for the jury, not a question of law for the court to decide." Railroad *v.* Owen, *supra*.

Obligation of Railroad Company to Furnish Suitable Apparatus to Prevent Fire.—A railroad company is bound to furnish proper and suitable mechanical devices to prevent the escape of fire. If it has done this, it has performed its full duty in the premises; Steinweg *v.* Erie R. Co., 43 N. Y. 123; Pittsburgh, etc., R. Co. *v.* Nelson, 51 Ind. 150; St. Louis, etc., R. Co. *v.* Gilham, 39 Ill. 455; Anderson *v.* Cape Fear S. Co., 64 N. C. 399; Spaulding

v. Chicago, etc., R. Co., 30 Wisc. 110; Toledo, etc., R. Co. *v.* Pindar, 53 Ill. 447; Frankford, etc., Turnpike Co. *v.* Philadelphia, etc., R. Co., 54 Pa. St. 345; Hoyt *v* Jeffers, 30 Mich. 181; Toledo, etc., R. Co. *v.* Com., 71 Ill. 493; Longabaugh *v.* Virginia City, etc., R. Co., 9 Nev. 271; Bevier *v.* Delaware, etc., R. Co., 18 Hun, 254; Jackson *v.* Chicago, etc., R. Co., 31 Iowa, 176; Illinois, etc., R. Co. *v.* McClelland, 42 Ill. 355; Bedell *v.* Long Island R. Co., 44 N. Y. 367; Lackawanna, etc., R. Co. *v.* Doak, 52 Pa. St. 379; Burlington, etc., R. Co. *v.* Westover, 4 Neb. 268; Jefferis *v.* Philadelphia, etc., R. Co., 3 Houst. 447; Philadelphia, etc. R. Co. *v.* Hendrickson, 80 Pa. St. 182; Burke *v.* Louisville, etc., R. Co., 7 Heisk. 451; Kansas, etc., R. Co. *v.* Butt, 7 Kans. 308; Brighthope R. Co. *v.* Rogers, 8 Am. & Eng. R. R. Cas. 710; Nashville, etc., R. Co. *v.* Tyne, 7 Am. & Eng. R. R. Cas. 515; Pittsburgh, etc., R. Co. *v.* Noel, 7 Am. & Eng. R. R. Cas. 524; Pittsburgh, etc., R. Co. *v.* Hixon, 8 Am. & Eng. R. R. Cas. 717; Slosson *v.* B. C. R. & N. R. Co., 11 Am. &. Eng. R. R. Cas. 67; Texas & Pacific R. Co. *v.* Levy & Bro., 13 Am. & Eng. R. R. Cas. 464; Haff *v.* West Jersey R. Co., 13 Am. & Eng. R. R. Cas. 476; Babcock *v.* Chicago & N. W. R. Co., 13 Am. & Eng. R. R. Cas. 477; Brown *v.* Atlanta & C. Air Line R. Co., 13 Am. & Eng. R. R. Cas. 479; Atchison, T. & S. F. R. Co. *v.* Riggs, 15 Am. & Eng. R. R. Cas. 531.

It is indicated in some of the authorities that the present scientific appliances are such, that by a judicious use of them the escape of sparks can be altogether prevented. Steinweg *v.* Erie R. Co., 43 N. Y. 123; Case *v.* Northern Central R. Co., 59 Barb. 644; Longabaugh *v.* Virginia City R. Co., 9 Nev. 271; Chicago, etc., R. Co. *v.* Quaintance, 58 Ill. 389; Small *v.* Chicago, etc., R. Co., 6 Cent. L. J. 310. It is believed, however, that such a conclusion is an erroneous one. The irresistible logical inference from such premises would be that any railroad company, the engines belonging to which emit sparks, is guilty of negligence *per se*.

NEW BRUNSWICK R. Co., Appellants,

v.

ROBINSON, Respondent.

(11 *Supreme Court of Canada Reports*, 689.)

R. owned a barn situated about two hundred feet from the New Brunswick R. Co.'s line, and such barn was destroyed by fire, caused, as was alleged, by sparks from the defendants' engine. An action was brought to recover damages for the loss of said barn and its contents. On the trial it appeared that the fuel used by the company over this line was wood, and evidence was given to the effect that coal was less apt to throw out sparks. It also appeared that at the place where the fire occurred there was a heavy up-grade, necessitating a full head of steam, and therefore increasing the danger to surrounding property. The jury found that the defendants did not use reasonable care in running the engine, but in what the want of such care consisted did not appear by their finding.

Held, reversing the judgment of the court below, that the company were under no obligation to use coal for fuel, and the use of wood was not in itself evidence of negligence; that the finding of the jury on the question of negligence was not satisfactory, and that therefore there should be a new trial.

APPEAL from the supreme court of New Brunswick, refusing to set aside a verdict for the plaintiff and order a new trial.

The facts of the case sufficiently appear in the judgments of the court.

Weldon, Q.C., for appellants.

Gregory for respondent.

SIR J. W. RITCHIE, C.J.—No doubt plaintiff has the right to use his barn as he pleases, but knowing that the legislature has permitted the running of locomotives on the railway passing his barn, if he chooses to place in his barn combustible materials, and to leave it in such a condition that such combustible materials are exposed to sparks from the engine, though provided with all the usual and requisite appliances for preventing the escape of sparks and the prevention of accidents, and an accidental spark should ignite such combustible material and cause the destruction of the barn and its contents, the owner must submit to the risk, as a consequence of the legislature having permitted the use of a dangerous agent; and the question is: Have the defendants used all reasonable precautions and appliances to prevent accidents? It cannot be supposed that the best appliances will absolutely avoid all danger from the emission of sparks; and therefore it behooves parties through whose premises the railway runs to understand the risk to which the sanction of the legislature, in the public and general interest of the country, to the running of locomotives has subjected them. And, if they choose to leave their property unnecessarily exposed, as in this case, it is their own imprudence, and they must bear the loss. QUESTION.

I think the fair result of the evidence is, that the fire took place from a spark from the locomotive getting into the hay and igniting it; and if the hay had not been left in the exposed condition it was, the fire would not, in all human probability, have taken place.

There was, in my opinion, evidence most proper for the consideration of the jury, as to whether the plaintiff was not guilty of great negligence in placing such a combustible article as hay in a barn so near the railway, with such openings as exposed such combustible material to fire from sparks from passing locomotives.

I think the correct rule was laid down in Collins *v.* N. Y. Cent. & Hudson R. Co, 12 S. C. Rep. N. Y. 502, "that one whose property is exposed to risk or injury from or by reason of its location, as where it is situated in a position of constant exposure to fire on the side of a railroad, must use such care as prudence would dictate in view of the unavoidable perils to which it is subject." RULE WHERE PROPERTY IS EXPOSED TO FIRE.

The legislature, then, having allowed the company to run a

locomotive on this railway, if parties place combustible materials in such near contiguity to the railway that there is reasonable ground for believing that they are liable to become ignited from sparks from the locomotive, even though all proper appliances for preventing sparks and all precautions and care are taken, the parties will be liable for contributory negligence if they omit reasonable care on their part to protect their property. Thus, if the plaintiff's barn when the railway came into operation was, or while locomotives were running is, open, so that under such circumstances sparks would be liable to enter and ignite combustible materials such as hay or straw housed therein, the plaintiff would, in my opinion, be guilty of contributory negligence if he placed such combustible materials in such a barn without having taken the care and precaution of closing the openings through which sparks might enter and lodge in the hay, there being, in my opinion, reciprocal duties as well on those who have combustible material near to the railway as on the railway company to use reasonable care and precaution.

In Radley *et al. v.* London & Northwestern R. Co., 1 App. Cas. 754, Lord Penzance says:—

"The plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident.

"But there is another proposition equally well established, and it is a qualification upon the first, namely, that although the plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him.

"This proposition, as one of law, cannot be questioned. It was decided in the case of Davis *v.* Mann, 10 M. & W. 546, supported in that of Tuff *v.* Warman, 5 C. B. N. S. 573, and other cases, and has been universally applied in cases of this character without question."

There is nothing whatever in the judge's charge relative to contributory negligence, though a question is left to the jury on this point. This last question, as appears by the judge's notes, was submitted at Mr. Gregory's request and prepared by him.

I think there was non-direction (tantamount to misdirection) in not pointing out to the jury the duty of plaintiff, and what would constitute contributory negligence, and stating distinctly to the jury the law in reference thereto. I think the charge defective also in reference to the fuel used.

The act which allows the use of locomotive engines necessarily allows the use of such fuel for propelling them as is ordinarily used

in the place where the locomotive is run, and if there is a difference as to the emission of sparks in the use of different descriptions of fuel, and there are different recognized precautions in use suitable to each description of fuel, and the precaution applicable to the particular fuel used is adopted, the railway company cannot be held liable for the consequences of a spark escaping and causing damage, no actual negligence being shown on their part. The legislature has sanctioned and authorized the use of dangerous engines, subject to the party using them taking all reasonable precautions. The railway company must use and carry fire along the railway for propelling their engines, and the statute has not limited the company to the description of fuel to be used. If then the company use a well-known and ordinary description of fuel, and take all reasonable and known precautions consistent with the use of such fuel, and in spite of such precaution sparks escape, the company cannot be held liable for the consequences, because they did not use another well-known and ordinary description of fuel, taking the usual precautions applicable to the use of such fuel. The use of wood cannot be said to be an illegitimate use of the locomotive; if not, and damage results from its use independently of negligence, the party using it cannot be held responsible. In other words, by using wood instead of coal the effect of the legislative authority to run the locomotive is not removed, and they are not left to their liabilities at common law, viz., that of using a highly dangerous machine at the peril of the consequences if it causes injury to others.

RIGHT TO USE LOCOMOTIVE WITH WOOD FOR FUEL.

In the supreme court of New Brunswick, *per* Richie, C.J., in Falconer *v.* The E. & N. A. R. Co., 1 Pugs. (N. B.) Rep. 183: "The fact that an accident has occurred is not of itself evidence of negligence, because its occurrence is quite consistent with due care having been taken. The plaintiff is not entitled to have his case left to the jury unless he gives some affirmative evidence of negligence. Hammock *v.* White, 11 C. B. N. S. 588. In Daniel *v.* The Metropolitan R. Co., 3 L. R. C. P. 216, Willes, J., says that to entitle a plaintiff to recover in an action for negligence, he must establish in evidence circumstances from which it may fairly be inferred that there is reasonable probability that the injury resulted from the want of some precaution to which the defendant might and ought to have resorted."

See Wharton on Negligence, pp. 869, 870, 872; Sheldon *v.* The Hudson Riv. R. Co., 29 Barb. 227; Collins *v.* N. Y. C. & H. Riv. R. Co., 5 Hun, 503.

The use of coal has not been adopted by reason of its being a safer article of fuel; the use of wood or coal has been determined with reference to economy and convenience. When railways were first established in New Brunswick wood was universally used by

locomotives as being the cheapest and most economical fuel. In localities where wood became scarce and dear, and coal more easily obtainable, coal was substituted; so with steamboats in the Bay of Fundy and harbor of St. John, coal is universally used; on steamboats plying on the river St. John, wood is generally if not universally used, and so with reference to fuel in ordinary use in the city of St. John and its neighborhood. The period is not very remote when wood was the fuel in general use; now coal is the article of fuel ordinarily used. In the part of New Brunswick through which this railroad runs (with the exception of the city of Fredericton and its immediate vicinity), wood ever has been and is the general ordinary fuel of the country.

June is by no means a month in New Brunswick characterized by excessive drought.

Railroad companies having used all proper care to guard against accident, if injuries occur they are *damnum absque injuria.*

The appeal should, in my opinion, be allowed with costs.

INSTRUCTIONS CONSIDERED.

STRONG, J.—Although a motion for a nonsuit was made at the trial and over-ruled, leave to move to enter a nonsuit was not reversed. Two of the objections to the directions of the learned judge specified in the notice of motion are as follows, viz.: (1) That there was misdirection in not instructing the jury that there was no evidence that the barns of the plaintiff caught fire from the locomotives of the defendant. (2) That if there was any evidence that they did so catch fire, then the learned judge should have told the jury that there was no evidence to submit to them as to negligence on the part of the defendants in the running of their train or locomotive on the day in question, and therefore the defendants were not liable for the loss. The only evidence to show that the fire was caused by sparks from the defendants' locomotive was that on the day on which the fire occurred a train passed along the railway, and a short time afterwards the respondent's barns, situated about 200 feet from the line of railway, were discovered to be on fire. In the absence of authority I should have doubted if this was sufficient to make a case for the consideration of the jury upon the question of the origin of the fire. I should have thought it not sufficient to prove that the fire might have originated from the sparks thrown out of the locomotive, but that the plaintiff was bound to prove something further to connect the fire with the passage of the engine. In Freemantle *v.* N. W. R. Co., 10 C. B. N. S. 80, such evidence was, however, held sufficient to make a *prima facie* case for the consideration of the jury. But from this case I should have thought the plaintiff was bound at least to have given some evidence to show there was no other probable cause to which the fire might have been ascribed; but, assuming there was evidence for the jury, and that they were

warranted in their finding as to the origin of the fire, I am of opinion that the plaintiff was bound to go further and give some evidence of negligence, such as the omission to use all proper and reasonable means to arrest the sparks by means of known contrivances for that purpose, and that in the absence of all proof of negligence the onus was nor cast upon the defendant of proving that they had adopted and used such precautions; in other words, that it was for the plaintiff to make out his case in the first instance by proving negligence in such a case as the present, as in all other cases of action for negligence. The only evidence of negligence given by the plaintiff was that so strongly relied on by the learned counsel for the respondent at this bar, that the defendants were guilty of actionable negligence in having used wood instead of coal for fuel. It was shown that the locomotive was one adapted for the use of wood. So that the question is just reduced to this: Is a railway company guilty of negligence in burning wood instead of coal in a country in which wood is a kind of fuel in common use? I cannot agree that this is any evidence of negligence. If it were, a railway company would be bound to consume coals as fuel when procurable, though involving a much greater outlay than the use of wood—a proposition so unreasonable as to be wholly untenable. If the fuel used was of an unusual or dangerous kind, then there would be no doubt *prima facie* grounds for imputing want of care, but when it is of a kind in common use for railway purposes, as in the present case, numerous American authorities show that railway companies are justified in using it.

I am not able to concur in the view that contributory negligence on the part of the plaintiff was shown by the fact that he maintained his barns in a dangerous proximity to the railway. I apprehend that a land-owner has a right to make any use of his land he pleases, and is entitled to be protected in that use against injury from the culpable negligence of others. Upon this point I refer to Fero *v.* Buffalo, etc., R. Co., 22 N. Y. 209; Grand Trunk Ry. *v.* Richardson, 91 U. S. 454–473.

I am of opinion that a rule for a new trial without costs should have been granted, and that this appeal must consequently be allowed with costs.

FOURNIER, J., concurred.

HENRY, J.—This is an action to recover damages alleged to have been sustained by the setting fire to and burning of the respondent's sheds, barns, and buildings by means of sparks of fire which issued from a locomotive railway engine of the appellants while passing the premises of the respondent, and it is charged that the same was caused by the negligence and unskilful working of the railway and the locomotive used thereon, and the negligent and unskilful management of the appellants and their servants of

FACTS.

the locomotive engine, and the fire and burning matter therein contained; and it was alleged that the locomotive engine was so insufficiently constructed that sparks from the fire therein and portions of the burning matter escaped from the locomotive engine and set on fire and burnt the sheds, barns, and buildings, together with certain hay, farming utensils, plant, tools, and goods of the respondent. The appellants pleaded that they were not guilty. The appellants, by their charter, were authorized to contract for and equip and operate certain lines of railway, including the one in question.

The jury having found that the respondent's barns were burned by means of sparks from the appellants' engine, I do not consider it necessary to question the correctness of their finding. The law is fully settled that where legislative sanction is given to the use of locomotive engines, there is no liability for any injury caused by their use if every known means are adopted to prevent the escape of fire from them and necessary precaution is taken consistent with their ordinary use. As a reasonable result of the evidence the court below did not find, and I think properly, that there was want of any of the necessary precautions on the part of the appellants, and that every means in their power had not been used to prevent the escape of sparks from their engine, but founded their judgment solely on the fact that during the very dry weather at the time the fuel used was wood, and that coal should have been used as not so dangerous or likely to set fire to property on the line. In one of the questions submitted to the jury, "Did the defendants use reasonable care and caution in the material used for fires on the day in question?" they answered: "No, they did not, considering the surroundings, the state of the weather, the season of the year, the state of the country along the line, the dryness of the material, and its then liability to ignite flame from sparks." To another question, "What is the ordinary material used in the country—that is, wood or coal?" they answered: "If for domestic purposes, wood; locomotives, wood and coal." In answer to the question: "Was the fire caused by the negligence of the defendants?" they answered: "Yes," but did not point out wherein the negligence consisted. In answer to another question, "Supposing the jury arrived at the conclusion that fire was caused by sparks from the engine, and that sparks caused the damage, do the jury find that, though wood was used, if reasonable care was used the fire might and likely would not have occurred?" they answered: "Yes." And to the question, "Supposing wood was the proper fuel, was the running of the engine conducted with reasonable care?" they answered: "No." Notwithstanding all these questions and answers, it does not appear to me that the findings amount to negligence, for which the appellants would be answer-

able. The want of reasonable care suggested in the last two questions is in no way definite. It might mean want of care in running with an engine not properly constructed to prevent the emitting of fire or sparks, or it might be the want of care in the use of the engine. I think the court below was right in not founding their judgment upon such vague findings, particularly under the evidence. The judgment is founded on the proposition that if fuel of wood is more likely to do injury than fuel of coal, a railway company must be held to use the former at the peril and risk of paying damages for all injuries occasioned thereby which would not have happened had coal fuel been used. There are many objections to such a ruling, and one a practical one, which would be the difficulty of determining the question. It is known that what are called hoods are used near the top of every locomotive smoke-stack to prevent egression of lighted sparks, and if those used where wood is the fuel were placed on smoke-stacks for coal they would clog up and the draft would be practically destroyed; and if those intended for coal were used with fuel of wood, the sparks would not be restrained. I take it that if that if the proper hood is used for coal or wood, as the case may be, and still an injury is done by the emission of sparks, the company is not answerable. The use of wood for fuel in railway engines is not unlawful, but greater precautions are necessary in regard to the sparks. Being lawful if properly used it may be so used at all times with impunity, and the only obligation imposed by law is to use the proper and well-known precautionary measures and means. There is no evidence that such were not used and employed in this case. To entitle the plaintiff to recover, in an action such as the present, he must prove negligence by showing the proper preventive means were not used on the occasion. In this case he has not done so, and it would be a wrong and dangerous course to leave the rights of parties to be dealt with and decided upon by the speculative decision of a jury on the probable results of the use of wood instead of coal—I cannot find any precedent for such a submission, and I can discover no principle to sustain it. The law governing cases of this kind is founded on the immunity awarded to those using locomotive engines on railways, and they have the right at all times, and at all seasons of the year, and in every state of the railway surroundings, to use wood for fuel, and they cannot be charged as for negligence for doing what the law permits. The jury found that for locomotives wood as well as coal was the ordinary fuel. I take it a railway company can legally use either at its option, and with the proper precautionary means and appliances can legally use the one as well as the other, and with the same immunity from the consequences of damages done to the property of others.

USE OF WOOD NOT NEGLIGENCE.

I think the judgment appealed from should be reversed and a new trial granted with costs.

GWYNNE, J.—This is an action brought by the plaintiff against the New Brunswick R. Co. as defendants, to recover compensation for a barn and contents, alleged to have burned by sparks of fire permitted to escape from an engine of the defendants through the negligence, as was said, of the defendants and of their servants. The negligence charged in the declaration, as it was when amended at the trial, is thus stated :— FACTS.

"Yet the defendants and their servants not regarding their duty, so negligently and unskilfully built, used, and worked the said railway, and the locomotive used thereon, and managed the said locomotive, and the fire and burning matter therein contained, and the said locomotive engine was so insufficiently constructed, that sparks from the said fire and portions of the said burning matter escaped and flew from the said locomotive engine, to and upon the sheds, barns, and buildings of the plaintiff, whereby the same, with their contents, were burned and destroyed, to the plaintiff damages of $250."

At the trial the plaintiff tendered evidence for the purpose of establishing that wood (which was the fuel burned in the engine from which the sparks which set fire to the plaintiff's building were said to have proceeded) emitted more sparks than coal. Evidence of this nature was objected to as inadmissible, but was received, and the case as the evidence proceeded was chiefly rested upon the contention that the defendants should for this reason have used coal instead of wood, and that the use of wood under the circumstances was, therefore, such negligence as rendered the defendants liable in this action. The defendants produced evidence to establish that the engine was quite new and was furnished with the best apparatus to arrest the escape of sparks therein and in use in wood-burning engines, which this engine was. This evidence was not much questioned, the case for the plaintiff having been rested upon the use of wood instead of coal, and the fact that when passing the plaintiff's place a great pressure of steam was used, the consequence of such increased pressure being to cause more sparks to be emitted than happens under a light head of steam. This latter point was met by the defendants' showing that the grade there was steep and an ascending grade, to draw the train up which a greater pressure of steam was necessary. There were several objections taken by the defendants' counsel to the evidence offered by the plaintiff, and which was received by the learned judge who tried the case, for the purpose of establishing (as there was no direct evidence upon the point) that the fire which burned the plaintiff's building proceeded from the engine which had passed along the railway

close to the plaintiff s barn immediately before the fire broke out; but all that evidence was, I think, clearly admissible. It was also objected by the defendants' counsel that the learned judge wrongly rejected evidence offered by him to show that the plaintiff's property destroyed by the fire had been insured in an insurance office, and that he had been paid for his loss by the insurers, but that evidence was, I think, rightly rejected. The defendants' counsel also desired to put questions to the witnesses under examination for the purpose of obtaining evidence that wood was the fuel in ordinary use upon railways in New Brunswick. This evidence was rejected, but, in my opinion, was admissible and proper to be taken into consideration by the jury upon the question whether the use of wood on the engine in question without more, and in the absence of all other, negligence was, in the opinion of the jury, such negligence as should make them responsible in this action, and more especially was it material upon one of the questions submitted by the learned judge to the jury, namely, "What is the ordinary material used in the country, that is, wood or coal?"

USE OF WOOD FOR FUEL.

The learned judge, in submitting the case to the jury, told them that the plaintiff was not entitled to recover unless the damage of which he complained was caused by the negligence of the defendants, and that the plaintiff must establish this negligence to the satisfaction of the jury. He told them further that the defendants had a right to run their railway, but that they must use all proper appliances, care and diligence in working their trains, so as not to do damage to the people through whose property their line passes. This care, he said, extended as well to the construction of all the machinery as to the fuel used. He told them that the mere fact of sparks from the engine igniting the plaintiff's property does not fix liability on the defendants to pay damages; that there must be negligence on the part of the defendants, and that it was incumbent on the plaintiff to establish this negligence, and that if not proved to their satisfaction the defendants were entitled to succeed. With this charge, as far as it goes, it must, I think, be admitted that the defendants have no just ground of complaint, but it fails to draw the attention of the jury to the points upon which the plaintiff relied as establishing, and upon which the jury were to say whether, in their opinion, under all the circumstance bearing upon the point he had established, that the defendants were guilty of and if any of what, negligence to justify the jury in rendering a verdict against them in this action. The learned judge, however, together with the above charge, submitted certain questions to the jury, and among them the following:—

SPECIAL INTERROGATORIES TO JURY.

1. Did the defendants use reasonable care and caution in the material used for fires on the day in question?

2. Did the defendants use reasonable care and caution in the material used for firing purposes?

3. What is the ordinary material used in the country, that is, wood or coal?

4. Could the defendant have reasonably procured coal instead of wood at the time?

5. Was the fire caused by the negligence of the defendants?

6. Would the use of coal have materially reduced the risk of fire?

7. Supposing the jury arrive at the conclusion that the fire was caused by sparks from the engine, and that the issue of sparks caused the damage, do the jury find that though wood was used, if reasonable care was used, the fire might not, and likely would not, have occurred?

8. Supposing wood was the proper fuel, was the running of the engine that day conducted with reasonable care?

ANSWERS CONSIDERED.

The two first of the above questions, which appear to be one and the same, are, as it seems to me, susceptible of two constructions, and which was intended does not very clearly appear, namely,—whether the use of wood, as the material to create the motive power, constituted in itself without more a want of reasonable care and caution, or whether there was a want of reasonable care and caution in the manner in which the wood was used upon the particular engine in question. If this latter was what was intended it would have raised a question, material no doubt, but one which was scarcely suggested at the trial, namely, whether the engine was or not supplied with all proper appliances and contrivances for arresting the escape of sparks, and upon that point the jury should have been asked directly whether the defendants had been guilty of any, and, if any, of what negligence in that particular. If the former was what was intended, then, I think, the question should have been accompanied with some direction explanatory of the circumstances which would make the use of wood as the material for creating the motive power to constitute, if it would constitute, want of reasonable care and caution.

To these questions the jury answer in, as it appears to me, a very vague and unsatisfactory manner, not pointing at all to what they considered to be that want of reasonable care and caution which they find to have existed. In the question, as expressed in the first of the above formulas, they answer: "No, they did not, considering the surroundings, the state of the weather, the season of the year, the state of the country along the line, the dryness of the material, and its then liability to ignite flame from sparks." And to the question as put in the second of the above formulas they simply answer "No;" but what it was that in the opinion of the jury the defendants neglected to do which they ought to have done, or did which they ought not to have done, which in the view

cf the above circumstances detailed in their answer they considered to constitute the want of due care, there is no suggestion whatever, so as enable the court to judge whether there was any evidence to support such finding, or to justify a verdict against the defendants, a point of great importance, especially as it appears to me in this description of action, in which the known tendency of juries is so great to render verdicts against railway companies under the influence of sympathy with the plaintiff, instead of in accordance with the facts established in evidence.

To the third of the above questions they replied: "If for domestic purposes wood—for locomotives wood and coal;" thereby establishing that wood is a material ordinarily in use in New Brunswick for creating motive power in locomotive engines.

To the fourth and sixth of the above questions they answer "Yes."

Now, although coal could have been procured by the defendants, as found by the jury in answer to the fourth of the above questions, and although the use of coal might have materially reduced the risk of fire, it by no means follows as a conclusion of law, that the use of wood upon a railway, which for its entire length passes, as was said in the evidence, through a wooded country, where wood is procurable at every station, and which the jury by their answer to the third of the above questions, have found to be a fuel in ordinary use upon locomotives in New Brunswick, is in itself (even though the best appliances known to science and to practical experience to arrest sparks are used, and the utmost care in managing the engine is taken) such negligence as entitles the plaintiff to recover in this action. Whether the defendants were or not guilty of negligence, is a matter of fact to be expressly found by the jury, and what is the particular act or default, which in the opinion of the jury constitutes negligence in each case, should be clearly found and not be left in doubt, for what the jury might rely upon as constituting negligence the law might pronounce not to be. In cases of this nature, therefore, there should be no doubt as to the acts or defaults which the jury in each case rely upon as constituting the negligence which subjects the defendants to liability. In the present case the answers of the jury leave in the utmost doubt what it is that they rely upon as constituting the negligence of which the defendants are guilty. If they meant that the mere use of wood instead of coal without more, constituted the negligence relied upon, the effect of that finding would be to pronounce it to be illegal for the defendants to use wood-burning engines at all, unless at the risk of insuring all persons against damage by fire escaping from such engines, even though the best possible appliances should be used and the utmost care should be taken to prevent the escape of sparks, and this is a proposition which cannot, I think, receive any countenance in a wooded country

described as New Brunswick is to be throughout the entire length of the railway. But the jury do not say, as matter of fact, that this is the negligence of which they find the defendants to be guilty, and that they did not mean to find it to be so would appear from their answer to the seventh of the above questions, in which, by answering the question simply in the affirmative, they in effect say, in the words of the question, that though wood was used, if reasonable care was used, the fire might, and likely would, not have occurred. Now, what the want of care here referred to is, is not suggested; all that is said is that if something, not stated what, had been done, or it may mean that if something, not stated what, had not been neglected to be done, it is likely, but not clear, that the fire might not have occurred. The jury do not find any defect in the appliances used to arrest sparks; during the trial that point was scarcely questioned by the plaintiff; they do not find any want of care in the management of the engine to which they find that the fire was attributable. So likewise in their answer to the 8th question, while by answering "no" to the question as put to them they in effect find that, even supposing wood to have been proper fuel, still that the running of the engine that day was not conducted with reasonable care, but what want of care they find to have existed, and whether it consisted of omission or commission, there is not the slightest suggestion. Such answers, finding nothing definitely and leaving in the greatest uncertainty what the jury intended to find to have been done by the defendants which ought not to have been done, or to have been omitted to be done which ought to have been done, are, in my opinion, altogether too loose, vague, and uncertain to support a verdict against the defendants. As then the jury has not found that there was or whether there was or not any defect in the construction of the engine, used upon the occasion of the fire occurring, as a wood-burning engine, nor any want of proper appliances to arrest the escape of sparks, or any defect in the appliances which were used for that purpose which could and should have been avoided, and as, in my opinion, the mere fact that more sparks are liable to escape from wood than from coal does not make the use of wood as a motive power negligence subjecting the defendants to liability, and as there is so much doubt appearing upon the answers of the jury to the questions put to them, as to what they intended to find to have been done or omitted to be done by the defendants, which constituted negligence subjecting them to liability to the plaintiff, I think the case should be remitted to another jury, who should be required to state what is the particular negligence, if any, of which they shall find the defendants to have been guilty; and that the appeal should be allowed with costs, and a new trial.

Appeal allowed with costs.

PENNSYLVANIA R. Co. *et al.*

v.

COMMONWEALTH.

(*Advance Case, Pennsylvania. October* 4, 1886.)

A contract having been made between R., who was at the same time president of the Pennsylvania R. Co. and of the Pennsylvania Co., and M., representing the South Pennsylvania R. Co., a competitor of the Pennsylvania R. Co., which contract was signed by R. as president of the Pennsylvania Co., by which M. agreed to put the control of his company into the hands of persons to be named by R., the Pennsylvania Co. to give therefor certain bonds, to be guaranteed by the Pennsylvania R. Co.; and it appearing from the evidence that the arrangement was designed for the benefit of the Pennsylvania R. Co.: *held*, that the latter company would be considered as the real party to the transaction; and that it was within the provision of section 4, art. 17, of the Pennsylvania constitution, forbidding one railroad corporation to control any other railroad corporation owning, or having under its control, a parallel or competing line.

Such contract provided for the assignment of "the securities and contracts and control of the South Pennsylvania Railroad enterprise;" that the capital stock assigned should be "adequate to insure the control of the corporation;" that the assignment should be accompanied by the resignation of all the directors and officers of the South Pennsylvania R. Co., and of the American Construction Co. (which had contracted to construct the road), and the substitution of persons to be named by R. *Held*, that the contract was for the "control" of the company, within the language of the constitution, and the claim that it was not so, because the ownership of the stock of a corporation does not give control thereof, was not tenable.

In determining whether one road is a parallel or competing line in relation to another, traffic contracts with outside roads owned by the former may be taken into consideration.

It is not necessary that the road should be completed and in operation in order to bring the corporation within the description of the constitution as one "owning, or having under its control, a parallel or competing line."

Stockholders have no such right to sell their stock as will interfere with the granting of an injunction to prevent one railroad company from obtaining control of a competing company.

APPEAL from decree of court of common pleas, Dauphin county, continuing a preliminary injunction.

The following opinion was delivered in the court below.

"SIMONTON, P.J.—This is a suit brought by the attorney-general, in the name of and on behalf of the Commonwealth of Pennsylvania, for the purpose of obtaining an injunction to restrain the Pennsylvania R. Co. from obtaining and exercising control of the South

Pennsylvania R. Co. The theory of the case is that the acts sought to be enjoined are prohibited by section 4 of article 17 of the constitution of 1874. On the filing of the bill a preliminary injunction was awarded. Afterwards, on the application of the attorney-general, an examiner was appointed to take testimony to be used on the hearing of a motion to continue the injunction. A large mass of testimony was taken and filed, the motion was elaborately and ably argued, and we are now to determine whether the injunction is to be dissolved, or to be continued until the final hearing.

"The substance of the case made by the bill is that the Pennsylvania R. Co. and the South Pennsylvania R. Co. own and control parallel or competing lines of railroad; that the former corporation is about to obtain and exercise control of the latter; and that it is prohibited from so doing by the section of the constitution above referred to, which ordains as follows: 'No railroad, canal, or other corporation, or the lessees, purchasers, or managers of any railroad or canal corporation, shall consolidate the stock, property or franchises of such corporation with, or lease or purchase the works or franchises of, or in any way control, any other railroad or canal corporation owning or having under its control a parallel or competing line; nor shall any officer of such railroad or canal corporation act as an officer of any other railroad or canal corporation owning or having the control of a parallel or competing line. . . .'

"The facts are substantially these:—

"The Pennsylvania R. Co. is a corporation of this State, and controls and operates, partly as owner and partly as lessee, a line of railroad extending between New York and Chicago, by way of Philadelphia, Harrisburg, Pittsburgh, and points further west, constituting one of the so-called great 'trunk lines' of railroad between the seaboard and the West. The railroads west of Pittsburgh forming part of this line are operated by the Pennsylvania Co., a corporation of this State, all the stock of which is owned by the Pennsylvania Co., except what is necessary to qualify directors.

"The South Pennsylvania R. Co. is also a corporation of this State, and has authority to construct a line of railroad between Harrisburg and a place known as Port Perry, in the county of Allegheny, on the Youghiogheny river, through the counties of Cumberland, Franklin, Fulton, Bedford, Somerset, and Westmoreland. At Port Perry its line connects with the line of the Pittsburgh, McKeesport & Youghiogheny R. Co., with which company it has a traffic contract, giving it access to Pittsburgh. It has also traffic contracts with companies owning connecting railroads east of Harrisburg and west of Pittsburgh, which make it virtually part of a trunk line between New York and Chicago, by way of

Philadelphia, Harrisburg, and Pittsburgh. Its route is substantially parallel to the Pennsylvania Railroad; and when completed and in operation it would be a line parallel to and competing with the lines of the Pennsylvania R. Co. for freight and passenger traffic originating or terminating at Philadelphia, Harrisburg, or Pittsburgh. No part of its line has been completed. Over $5,000,000 has been expended in the work of construction, which is about one fourth the sum necessary to complete the work.

"The American Construction Co. is a corporation which has contracted to construct the road.

"As the result of negotiations carried on during the early summer of 1885, on the one side by Mr. George B. Roberts, president, and Mr. Frank Thomson and Mr. John P. Green, vice-presidents, of the Pennsylvania R. Co. (Mr. Roberts being at the same time president of the Pennsylvania Co.), and on the other side by a Mr. Morgan, a banker of New York, on behalf of such of the stockholders of the South Pennsylvania R. Co. as might affirm his action, a formal proposition in writing, signed by Mr. Roberts as president of the Pennsylvania Co., was made to Mr. Morgan, the substance of which is that Mr. Morgan would 'procure by purchase and legal assignment and transfer to such persons' as should be designated by Mr. Roberts, 'the securities and contracts and control of the South Pennsylvania enterprise, as follows, namely: "*First*, valid and outstanding certificates of subscription to the South Pennsylvania Syndicate, so-called, to an amount not less than 60 per cent. of the total issue thereof; *second*, the entire capital stock of the American Construction Co.; *third*, an assignment of all the capital stock, bonds, and securities of the South Pennsylvania R. Co., not represented by the certificates held by the said syndicate, or held by said construction company, which capital stock shall be adequate to insure the control of the corporation of the South Pennsylvania R. Co."' Thereupon the Pennsylvania Co. would 'cause to be delivered to' Mr. Morgan, 'in exchange therefor, upon the resignation of all the directors and officers of the said South Pennsylvania Railroad and American Construction companies, and of a majority of the committee of said syndicate, and the substitution in their stead of persons to be indicated' by Mr. Roberts or his nominee, bonds of the Bedford & Bridgeport Co., or of some other company, equal in amount to the sum invested in the enterprise by those assenting to the proposition, bearing interest at the rate of 3 per cent. per annum, principal and interest guaranteed by the Pennsylvania R. Co.; and, if 'the bonds or debentures herein proposed to be given should mature, the par value thereof shall be made good by the Pennsylvania R. Co., at its option, either in cash or by furnishing some other valid stock or bonds or debentures of equal par value, and with similar guaranty.'

"This proposition was, as we have stated, signed by Mr. Roberts, as president of the Pennsylvania Co.; but in it he contracts for the Pennsylvania R. Co., and the only party that was to assume any responsibility under it was that company,—the Bedford & Bridgeport R. Co. being utterly insolvent, and its bonds, without the guaranty, being worthless. The proposition was accepted by Mr. Morgan, and assented to by a sufficient number of those for whom he agreed to act to make it binding—the securities were delivered to him, but had not come into the hands of the stockholders when the injunction was issued.

"Counsel for defendants earnestly contend that these facts show that the Pennsylvania Co. is the party agreeing to purchase the stock and securities, and stipulating for the control of the South Pennsylvania R. Co. We have carefully considered all the arguments so ably advanced in support of this theory, but we cannot avoid coming to the conclusion that, as argued for the Commonwealth, the Pennsylvania R. Co. is the real party in the transaction. This is clearly shown by the testimony of Mr. Morgan and Mr. Roberts. Morgan testifies that, on his suggesting to Mr. Roberts that 'the thing could be carried through' if the Pennsylvania R Co. was prepared to give bonds bearing 3 per cent. interest for the amount paid in on the South Pennsylvania stock subscriptions, Mr. Roberts 'doubted the policy or the ability of the Pennsylvania R. Co., as such, to buy off, or in any way to interfere with, what might be rival roads;' whereupon Morgan 'suggested that there were plenty of corporations that would do it, and that would work in harmony with the Pennsylvania.' And, again, he says: 'The only thing that was stipulated was that the security that should be given to the subscribers should bear the absolute guaranty of the Pennsylvania R. Co. As to what company it came from, or anything of the kind, that was, of course, immaterial.' And again: 'I addressed Mr. Roberts, because I was acting in harmony, in trying to get this road out of the way of the Pennsylvania R. Co. It was the Pennsylvania Railroad that was complaining of the construction of the road;' and he assented to the statement that the negotiations were based on this idea.

"And Mr. Roberts states frankly that they came to 'talk about' the Pennsylvania Co. in this negotiation, 'simply because the character of the securities, and the conditions of the South Pennsylvania road, were such that it would in all probability be beyond the chartered powers of the Pennsylvania R. Co. to build it, or to purchase the securities. . . .' And he answered in the affirmative, without comment or explanation, the following question of the attorney-general: 'Therefore, as I understand you, the Pennsylvania R. Co. was the party to this negotiation; but so far as the details of carrying it out were concerned, and to

be within the law, you were to use the name of the Pennsylvania Co., or any other company that you were connected with, that you might be able to do?' And he further says that 'for all purposes of the transactions that were then going on, or discussion there had, it would be fair and proper to assume that I was president of, and being conversed with as president of, the Pennsylvania R. Co.' And, as we have already seen, in the letter of August 5, signed by him as president of the Pennsylvania Co., he contracts on behalf of the Pennsylvania R. Co. that the bonds to be delivered shall bear its guaranty, and that, if the principal of the bonds shall mature, it will replace them, or, at its option, pay them in cash; these being the only two clauses in the contract which involved the giving of anything in value.

"In view of this plain and candid statement of the real facts of the case by the parties themselves, it is impossible, as we have already said, to draw any other inference than that the real party contracting and stipulating for the control of the South Pennsylvania R. Co. was the Pennsylvania R. Co., and that any title to any stock or securities intended to be held in the name of the Pennsylvania Co. was to be a mere naked legal title, to be held in trust. In other words, that the Pennsylvania R. Co. intended to do in fact what it feared it was forbidden by law to do, and therefore attempted to give the transaction the appearance, in the eye of the law, of being other than it really was. This, of course, cannot avail in a court of equity, which looks at substance, without being controlled by form.

"It is further strenuously urged, on behalf of defendants, that even if the Pennsylvania R. Co. be the real party to the contract, it has not done or stipulated for anything prohibited by the constitution, for the reason that the purchase of the stock of a 'parallel or competing line' is not among the things prohibited; and the case of Pullman Palace Car Co. *v.* Missouri Pac. R. Co., 6 Sup. Ct. Rep. 194 (recently decided by the supreme court of the United States), is cited to sustain the proposition that the ownership of the stock of a corporation does not give control of the corporation. We have carefully considered the opinion delivered in that case, which, although not of binding authority upon the state courts, because not deciding a federal question, is yet, in view of its source, entitled to the highest respect. But we do not think it sustains the position contended for. The decision of the question of control was not called for in the case, which was already decided on another and fundamental point. But, waiving this, the point decided is merely that the ownership of the stock does not necessarily give control of the road. The chief justice says, speaking of the stockholding company: 'Practically, it may control the company, but the company alone controls its road.' 6 Sup. Ct. Rep. 199. This distinction seems very narrow, but it is

certainly involved in the conclusion reached, which cannot stand unless it is recognized; for it is too plain to bear argument that the ownership of the stock of a corporation carries with it the control of the corporation. Indeed, this is merely a different way of stating the truism that a corporation is controlled by its stockholders. That they do it through the agency of a board of directors and other officers does not alter the fact.

"All this was well understood by Mr. Roberts, as is shown by the stipulation that the capital stock to be assigned 'shall be adequate to insure the control of the corporation of the South Pennsylvania R. Co.;' and the intention to control is shown by the condition in the contract that the things to be assigned were 'the securities and contracts and control of the South Pennsylvania Railroad enterprise,' and the further condition that the assignment or the securities and stock should be accompanied by 'the resignation of all the directors and officers of the said South Pennsylvania Railroad and American Construction Companies, and of a majority of the committee of said syndicate, and the substitution in their stead of persons to be indicated by Mr. Roberts, or his nominee.' Not only was the South Pennsylvania to be controlled, but also the company having the contract for the construction of its road; and as to this, its entire capital stock was to be obtained, 'free from all debts and contracts of any kind whatever.' This would insure, not only control of the railroad corporation as it then stood, but also the power to abrogate the contract then held by the construction company for the building of the road.

"We have found, as a fact, that the line of the South Pennsylvania R. Co. connects at Port Perry with the line of the Pittsburgh, McKeesport & Youghiogheny R. Co., and that it has a traffic contract with that company giving it access to Pittsburgh. A line running from Harrisburgh to Port Perry could hardly be said to be a 'parallel or competing line' to and with the Pennsylvania R.; although, if extended from Port Perry to Pittsburgh, it certainly would be such. But defendants contend that the fact of the traffic contracts ought not to be taken into consideration, and that, as the line of the South Pennsylvania does not itself extend to Pittsburgh, we must conclude that this corporation does not own or control a parallel or competing line. We are unable to adopt this view. The traffic contract gives it the right to use the Youghiogheny road between Port Perry and Pittsburgh. Section 1 of article 17 of the constitution secures it the right to have its cars received and transferred over all railroads in the State with which it may connect. We cannot doubt that it would in fact compete; and it is competition, in fact, which the constitution designs to encourage, as it was competition in fact, which the defendants were endeavoring in this case to prevent, and which they

knew would occur over this line if it were not '"taken out" of the railroad situation,' to use Mr. Morgan's expressive phrase.

"But the argument was earnestly pressed upon us that the prohibition of the constitution applies only to a corporation owning, or having under its control, a railroad completed and in operation; that, in the nature of things, there can be no competition in transportation when there is no road over which to transport. The constitution forbids a railroad corporation to 'in any way control any other railroad . . . corporation having under its control a parallel or competing line,' not parallel or competing railroad; and we cannot doubt that the word 'line,' was employed advisedly, in this place, instead of 'road' or 'railroad.' It is the term constantly used to denote the route of an intended railroad. Thus, in section 2 of the act of February 19, 1849, relating to the assessment of damages for lands taken, it is provided that viewers may be appointed, 'neither of whom shall be residents or owners of property upon or adjoining the "line" of such railroad;' where manifestly the term 'line' is used to designate the surveyed route, and not the completed road, as the view may be had before the road is constructed. So, in section 2 of the act of Congress of July 29, 1866, incorporating the Atlantic & Pacific R. Co., the company is authorized 'to take from the public lands, adjacent to the line of road, material of earth, stone, timber, and so forth, for the construction thereof.'

"These are random instances of a use of the term which is so common as to leave no doubt as to its meaning in the clause of the constitution under consideration. And, understanding this meaning, we are bound to give it due force and effect. If we do not, the purpose of the constitutional convention in enacting the clause, and of the people in ratifying it, might always be, and in this case would be, entirely defeated. The purpose undoubtedly was to promote competion in railroad traffic. But if a corporation engaged in constructing a competitive road may be controlled by its rival until the road is completed, it would be entirely within the power of the rival to determine whether that event should ever happen; as, of course, it never would, when it was the interest of the rival to prevent it, for no company would complete a road to hand it over to a competitor.

"For these reasons, we think the proper construction of the phrase, a 'parallel or competing line,' is that it includes a projected road, surveyed, laid out, and in process of construction, as we have found to be the fact in this case, if such road, when completed and in operation, would actually compete with the road seeking control. Before completion it is 'parallel;' when completed it becomes 'competing.'

"During the argument counsel invoked the aid of the undoubted general principle that the ownership of shares of stock, as of other

property, carries with it the legal right to sell, and contended that the owners of the shares of the South Pennsylvania R. Co. could not legally be restrained from so doing, and that an injunction against the purchaser would have this effect. We do not think the principle applies to this case. We are not called upon to express any opinion as to the right of the individual shareholders to sell their several shares *bona fide* in the open market. This, so far as they are concerned, is an intended sale in combination, for the express purpose of enabling them to abandon the rights and duties conferred and imposed upon them by the act incorporating the company, and of putting the control of their corporation into the hands of its rival. This is an act contrary to the public policy of the State, which they have no right to do. Indeed, all the parties to this transaction seemed to have failed to appreciate the relations they sustain to the public. A charter is a contract, and a contract must always have two contracting parties, upon each of whom it imposes duties as well as confers rights. The charter of a railroad company especially, while it confers and because it confers rights of the highest kind, imposes corresponding duties. It invests the corporation with part of the sovereignty of the State,—the right to take private property for (let it be clearly understood) public use. But if the taking of private property for the purpose of constructing a railroad upon it is taking it for public use, then the public must have an interest in such use. And such is the case.

"'A railroad is a public highway for the public benefit. . . . The public has an interest in such a road when it belongs to a corporation, as clearly as they would have if it were free. . . . The companies may be private, but the work they do is a public duty; and, along with the public duty, there is delegated a sufficient share of sovereign power to perform it. The right of eminent domain is always given to such corporations, but the right of eminent domain cannot be used for private purposes. . . .' Sharpless *v.* Mayor, 21 Pa. 169.

"'The right of eminent domain nowhere justifies taking property for a private use. Yet it is a doctrine universally accepted that a state legislature may authorize a private corporation to take land for the construction of such a road, making compensation to the owner. What else does this doctrine mean, if not that building a railroad, though it be built by a private corporation, is an act done for a public use? And the reason why the use has always been held a public one is that such a road is a highway, whether made by the government itself, or by the agency of corporate bodies.' Olcott *v.* Supervisors, 16 Wall. 694, per Mr. Justice Strong. And the same eminent jurist, when a justice of the supreme court of this State, said, of an unfinished railroad, that 'the commonwealth had a right to demand that all the resources, rights, and credits of the company should be devoted to its completion;' and

that the directors of a railroad corporation are 'trustees, in a very just sense, for the commonwealth.' Bedford R. Co. *v.* Bowser, 48 Pa. 29.

"But as our purpose here is to show merely that the parties to the transaction were not dealing with a purely private matter, we will not pursue this subject further; nor are we now concerned with the question whether there be power in the courts to compel the construction of a railroad by a corporation which has undertaken it. What we here decide is simply that the corporators have no such right to sell their stock as can in any way interfere with the granting of an injunction to prevent a competing corporation from obtaining control of the corporation charged with the duty of its construction.

"We have not overlooked any of the questions argued by counsel; but, in our view, the case does not call for the decision of any other than those considered above.

"The result of the discussion is that the injunction must be continued as to the Pennsylvania R. Co., the Pennsylvania Co., and the Bedford & Bridgeport R. Co., and dissolved as to the other defendants; and a decree may be drawn accordingly."

In accordance with this opinion, a decree was made continuing, until final hearing, the preliminary injunction before granted, enjoining the Pennsylvania R. Co. from purchasing, controlling, or in any way obtaining control of, the stock, property, and franchises of the South Pennsylvania R. Co.; and enjoining the other defendant companies from doing the various acts assigned as their part of the transaction in question. Defendants appealed from the decree, and assigned error on the part of the court below (1) in making said decree; (2) in not defining therein the meaning of the word "control" used therein; (3) in seeking to enjoin what had been already done before the filling of the bill.

J. T. Brooks, *David W. Sellers*, *Hall & Jordan*, *John Scott*, and *Wayne Mac Veagh* for appellants.

Lewis C. Cassidy, Atty. Gen., and *Robert Snodgrass*, Deputy Atty. Gen., for appellee.

PER CURIAM. Decree affirmed, and each appeal dismissed, at the cost of the appellant.

PENNSYLVANIA R. Co.

v.

COMMONWEALTH.

(*Advance Case, Pennsylvania. October* 4, 1886.)

The purchase by one railroad company of a controlling interest in another company, which competes with roads leased by the first, is within the prohibition in Pennsylvania constitution, art. 17, § 4, against one railroad company obtaining control of any competing line, and the transaction will be enjoined, although the stock bought is to be taken in the name of a third company; the stock of the latter being largely owned by the first-mentioned company, and the purchase being professedly in the interest of that company, and the consideration therefor being paid by it.

APPEAL by defendants from decree of the court of common pleas, Dauphin county, continuing a preliminary injunction.

The following opinion was delivered in the court below:—

"MCPHERSON, J.—The motion before us is to continue the preliminary injunction heretofore granted. The opposing views of the parties have been argued with such candor and ability as befit their great importance, and it only remains to state the conclusions of the court. They are these: First, that the injunction must be continued until final hearing, so far as the Pennsylvania R. Co. and the Northern Central R. Co. are concerned; and second, that the evidence before us does not require its continuance against the other defendants.

"The jurisdiction of the court to interfere by injunction was earnestly denied, and it was insisted that a writ of *quo warranto* was the proper remedy. This position, however, does not seem to be sound, in view of the express language of section 13 of the act of 1836, P. L. 789. That section, together with the act of 1857, P. L. 39, gives to the courts of common pleas the power and jurisdiction of courts of chancery, so far as relates, *inter alia*, 'to the prevention or restraint of the commission or continuance of acts contrary to law, and prejudicial to the interests of the community or the rights of individuals.' From this provision it seems plain, and not to need discussion, that if the acts being done or proposed to be done are or would be in violation of the constitution, and prejudicial to the interests of the community, we have express authority to restrain their commission or continuance. Whether or not the remedy by *quo warranto* is also proper, we need not now consider.

"A considerable amount of testimony was taken, but there is substantial agreement as to all points now material. We find the important facts to be as follows: —

"(1) The Pennsylvania R. Co. is a railroad corporation of this commonwealth, and leases, operates, and controls the Tyrone & Clearfield Railroad and the Bald Eagle Valley Railroad, with their branches and connections. These leased roads reach portions of the Clearfield coal region in the counties of Clearfield and Centre.

"(2) The Beech Creek, Clearfield & Southwestern R. Co. is a railroad corporation of this commonwealth, owning and operating a practically completed line of railroad which also reaches portions of the Clearfield coal region.

"(3) The leased roads alone, above mentioned, are direct and substantial competitors with the Beech Creek road for certain freight and passenger traffic in the said region.

"(4) The Northern Central R. Co. is a railroad corporation, chartered in part by this commonwealth, owning or leasing and operating a line of railroad which, so far as we are now informed, does not of itself compete with the railroad of the Beech Creek Co. It is not leased by the Pennsylvania R. Co., but the latter company owns six thirteenths of its capital stock, and the business relations between the two companies are close and harmonious.

"(5) The Pennsylvania R. Co., through certain of its executive officers acting in its behalf, has offered to buy 60 per cent. of the capital stock of the Beech Creek Co. upon the following terms, viz.: the legal title to said stock to be transferred to and held by the Northern Central R. Co.; and, in consideration of such transfer, the Pennsylvania R. Co. to indorse upon $5,000,000 of the bonds of the Beech Creek Co. now issued, a contract to buy, at 4 per cent upon said $5,000,000, the semi-annual 6 per cent interest coupons thereof, with subrogation to the rights of the bondholders upon said coupons against the Beech Creek Co. This offer has been practically, although perhaps not formally, accepted by the owners of said 60 per cent of stock, but nothing further has yet been done, and no formal corporate action upon the proposition has yet been had. The evidence, however, warrants us in finding that the proposition will be carried into effect, if this court does not continue to prevent.

"(6) The Pennsylvania R. Co., through its said executive officers, was a principal actor in negotiating for the purchase of this stock; and the chief object of the transaction upon its part was to destroy or materially disable the direct and substantial competition between its said leased lines and the Beech Creek road, so far as the traffic to and from certain portions of the said coal region is concerned.

"These are the important facts; and the question is whether a violation of section 4, art. 17, of the constitution, is threatened by the defendants, or by any of them? If it is, we may enjoin it, for

it need not be argued that to destroy such competition as is here disclosed is prejudicial to the interests of the community.

"The section referred to, so far as now material, is as follows: 'No railroad, canal, or other corporation, or the lessees, purchasers, or managers of any railroad or canal corporation, shall consolidate the stock, property, or franchises of such corporation with, or lease or purchase the works or franchises of, or in any way control, any other railroad or canal corporation owning or having under its control a parallel or competing line.'

"It is clear that a violation of this section would be threatened if the Pennsylvania R. Co., which leases certain roads directly and substantially competing with the Beech Creek road, were about to buy and hold in its own name a majority of the stock of the latter company; for in that case the Pennsylvania R. Co., as such lessee, would certainly 'control another railroad corporation owning or having under its control a parallel or competing line.' It will be seen that this language differs, in an important respect, from the language lately construed by the supreme court of the United States in the case of Pullman's Palace Car Co. *v.* Missouri Pac. R. Co. [6 Sup. Ct. Rep. 194]. There the contract spoke of 'roads' under the control of the defendant; and it was declared that to own a majority of the stock of a railroad corporation did not give the control of the road, although it might give control of the company. Here, however, the clause of our constitution just quoted speaks of the control of the company,—not of the control of the road,—and it seems evident, therefore, that the case referred to is not now in point, and need not be further considered. Indeed, it was expressly conceded upon the argument that the Pennsylvania R. Co., as the lessee of lines competing with the Beech Creek road, could not buy this stock, and hold it in its own name; but it was strongly urged upon as that the Northern Central R. Co. is to be treated as the purchaser because it is to hold the legal title, and that the question of legality must be determined as if it concerned only this latter company and the Beech Creek corporation.

"This is a vital point in the defence of the Pennsylvania R. and Northern Central R. companies, and we have therefore given it the fullest consideration in our power, but without being able to conclude that we must look at this bargain in any other light than that now cast upon it by the truth. The evidence does not support the position we are asked to take. The offer before us does not in fact come from the Northern Central R. Co., but from the Pennsylvania R. Co. through its executive officers; and we are therefore able to deal, even in form, directly with the latter company. Its officers helped to carry on the negotiations, acting in its behalf, and they agreed in its name to the final terms; it is to furnish the only consideration by guarantying in part the coupons of the Beech

Creek bonds; and its interest, chiefly and avowedly, is to be advanced by the transaction.

"Is the further fact that, because it cannot lawfully hold the stock it has contracted to buy, it proposes to have the legal title thereto held by the Northern Central R. Co., enough to make of no importance the other facts detailed? The case does not even present us with a finished transaction and a legal title already passed. Up to this time, it is the Pennsylvania R. Co., acting by its proper executive officers, which has been directly dealing with the owners of the Beech Creek stock, and the transaction can and should be looked at as in truth it is.

"If we consider, also, the reason which led the real parties to propose that the Northern Central R. Co. should hold the legal title to this stock, it will become more clear that justice does not require us even to treat this bargain as already carried out. That reason was, avowedly, to evade the constitutional provision already quoted; and it was believed that, if the legal title was held by the Northern Central R. Co., such evasion could be brought about. We are now asked to deal with the transaction as if it was complete, and thus, in effect, to aid the parties in their effort to avoid the law. They are not yet clear of legal difficulties, and we are asked to help them out by assuming the facts to be other than they are, in order that a plain provision of law may be evaded. Legal fictions are not intended for such purposes. They should only be used to bring about a just result, and not to aid in covering up the truth.

"Further, we do not think the Pennsylvania R. and the Northern Central R. companies are in a position to urge, before a court of equity, that the bargain, if fully carried out, would not violate the constitution. The facts, again, are these: The Pennsylvania R. Co. made the contract in question, and agreed to furnish the sole consideration, for the purpose chiefly of destroying or disabling a serious competition between its leased lines and the Beach Creek road,—that is, for the purpose of violating the constitution; but, when it appears that the illegal nature of the transaction was too plain, the Pennsylvania R. Co. proposes, and the Northern Central R. Co. agrees, that the legal title to the stock shall be held by the latter,—not because the true nature of the bargain has been changed, and not because of a change in purpose, but simply in order that such nature and such purpose may be, as it is thought, effectively disguised. Being prevented, however, by injunction, they now urge that no such purpose as that intended will in fact be brought about, and ask us to look at the matter as if the Northern Central R. Co. was the independent *bona fide* purchaser of the stock in question.

"When such a case is in truth presented, we will then determine

the questions so earnestly and ably argued, viz., whether such a holding by the Northern Central R. Co., would in itself violate the constitution; and, if not, whether it would nevertheless be a violation because of the relation between that corporation and the Pennsylvania R. Co. But we repeat, the evidence does not now permit these questions to be raised; for, with the facts as stated, the situation is quite different, and we must take it as the parties have made it for themselves. We shall not being doing justice to the corporations named if we assume that they could do what they were willing to attempt; and they cannot successfully ask us to say that their motive and purpose were different from those which they distinctly avowed.

"If the view above expressed is correct, it fully disposes of the case, for no contract right to do the thing forbidden is set up, and it follows that the injunction against the Pennsylvania R. and Northern Central R. companies must be continued until final hearing, As to the other defendants, it is enough to say that nothing now before us requires us to consider whether in any case they are properly subject to the constitutional provision in question. As the evidence now is, at least, nothing has been proved which calls upon us to continue the injunction against them, and, so far as they are concerned, it is therefore dissolved. A decree may be prepared in accordance with this opinion."

A decree was made accordingly, continuing, until final hearing, the preliminary injunction before granted. From this decree defendants appealed, assigning error on the part of the court below in making said decree, and in enjoining the Northern Central R. Co. generally, instead of merely as agent of the Pennsylvania R. Co.

Wayne Mc Veagh for appellants.

Lewis C. Cassidy, Atty. Gen., and *Robert Snodgrass*, Dep. Atty. Gen., for the Commonwealth.

PER CURIAM.—Decree affirmed, and each appeal dismissed, at the cost of the appellant.

Texas & Pacific R. Co.

v.

Medaris.

(64 *Texas*, 92.)

In this State the husband may sue alone for the recovery of the wife's separate property, and recover damages occasioned by injury to such property.

It is not negligence *per se* in a railway company to allow grass and weeds to grow and accumulate upon its right of way, in the absence of a statute forbidding it. Nor is the fact that sparks are permitted to escape from a moving engine negligence *per se*. In the operations of trains, etc., such companies are required to exercise that degree of prudence which, under like circumstances, a reasonably cautious person would exercise.

It is not error to refuse special charges which are embodied in the general charge. See charge of court below.

Appeal from Parker. Tried below before the Hon. A. J. Hood.

July 11, 1883, Medaris brought suit against the railway company to recover damage for negligent burning of his pasture fence and grass.

January 29, 1884, by first amended petition then filed, he alleged that the land upon which the fence and grass were destroyed belonged to his wife, Mary H. Medaris, and seeks the recovery in the right of his wife, alleging that the company negligently permitted grass and weeds to grow and accumulate upon its right of way, and then negligently permitted sparks to escape from passing engines, and set the same on fire, which immediately communicated the fire to said lands of his wife and destroyed the fence and grass as charged.

Appellant answered by exceptions and plea of not guilty.

The case was tried August 16, 1884, and verdict was returned and judgment entered for appellee for $400.

The court charged in effect that, if the railroad company used that degree of care and prudence in running its engines, with reference to plaintiff's grass and fencing along its route, by keeping its right of way free from combustible matter, which railway companies of usual care and prudence commonly used under like circumstances to those in this suit, then defendant was not liable. But if the defendant so operated its engines that it did not observe, with reference to the safety of plaintiff's grass and fencing, that degree of care and prudence that is commonly used by railway companies under like circumstances, and did not keep its right of way in as safe condition, with reference to fire, as such companies usually did under like circumstances, and that plaintiff was damaged

as alleged, it would be their duty to find for the plaintiff. If the evidence failed to establish negligence on the part of defendant, or that plaintiff's property was destroyed by such negligence, or that plaintiff was thereby damaged, they would find for defendant. That by the term negligence, as used in this charge, was meant a want of that degree of care, caution, and prudence which ordinary men commonly use under like circumstances, with reference to safety of property.

B. G. Bidwell for appellant.

McCall & McCall for appellee.

WATTS, J. Com. App.—In this State the husband may sue alone for the recovery of any separate property belonging to the wife. R. S. art. 1204. And also to recover damages occasioned by injuries to such property.

For the purposes of this suit, the evidence clearly showed that the title to the land was in Mrs. Medaris, and it was not necessary for the court to do more than instruct the jury as to the principles of law applicable to the contested issues.

The destruction by fire of both the grass and fence was clearly shown, and also that the fire was occasioned by escaping sparks from the engines of appellant.

It is not negligence *per se* in a railway company to permit grass and weeds to grow and accumulate upon its right of way, in the absence of a statute requiring these to be removed from the right of way.

Nor is the fact that sparks may escape from a moving engine negligence *per se*.

These companies, the same as natural persons, are required to so use their own property as not to unnecessarily injure that of others. But in the operation of trains, etc., such companies are required to exercise that degree of prudence which, under like circumstances, a reasonably cautious person would exercise.

While perhaps the rule announced in the charge as given would not in all respects be as stringent as that stated above, still the errors, if any, are such as appellant could not be heard to assert. In this particular the charge was perhaps more favorable to appellant than the case would authorize. At any rate there is no error in the charge against appellant.

Upon the case as presented the measure of damages would be the value of the fence and grass destroyed. The negligence of the appellant was affirmed by the jury, and an inspection of the record will show that the finding is sustained by the evidence.

The special charges asked and refused, so far as applicable to the case made, were embodied in the general charge, and it was not error to refuse them.

As to the amount of the injury, there is some conflict in the evidence, but the verdict is amply sustained by the evidence.

After a careful examination of the record, we have been unable to find any such error as ought to work a reversal of the judgment, and therefore recommend its affirmance.

Judgment affirmed.

INDIANA, BLOOMINGTON AND WESTERN R. Co., Appellant,

v.

OVERMAN.

(*Advance Case, Indiana. February* 19, 1887.)

Where a railroad company sets fire to the dry grass and other combustible materials which it has negligently suffered to accumulate on its track and right of way, and, without fault of the adjoining land-owner, permits such fire to escape to his lands, and burn and destroy his property, the railroad company will be liable for the damages, whether such fire was started negligently or otherwise.

Where it is shown by sufficient uncontradicted evidence that the railroad company negligently permitted dry grass and other combustible materials to accumulate on its road and right of way, and that fire was communicated thereto from its locomotives in some manner, evidence offered by the railroad to show the kind of stack, fire-box, and ash-pan in use on its locomotives was properly excluded.

The railroad company had the right to set fire to and burn the dry grass and other combustible material on its right of way; but it is bound at its peril to keep such fire within its own limits.

APPEAL by the defendant from a judgment of the Henry circuit court in favor of the plaintiff in an action for injury to property by fire spreading from the defendant's right of way. Affirmed.

The facts are stated in the opinion.

C. W. Fairbanks for appellant.

L. P. Newby and *Brown & Brown* for appellee.

HOWK, J.—The first error of which appellant here complains is the overruling of its demurrer to appellee's complaint.

The complaint contained four paragraphs, to each of which appellant demurred upon several grounds of objection; but in this court, the only objection urged to either paragraph of FACTS. complaint is that it does not state facts sufficient to constitute a cause of action. In their brief of this cause, appellant's counsel concede that substantially the same facts are stated in each of the first three paragraphs of complaint, and therefore we need only to

consider and pass upon the question of the sufficiency of one of these paragraphs, and the objections of counsel thereto, in this opinion.

In the first paragraph of his complaint the appellee averred that he was the owner of certain lands in Henry county, Indiana, and that such land adjoined appellant's railroad and right of way; that a part of his lands was sown with timothy seed and was producing a large and valuable crop of grass and hay; that appellee's barn, a large and valuable building, was situate on his lands aforesaid, within about 600 feet of appellant's railroad and right of way, and such barn contained a large lot of lumber and a number of agricultural implements, all of great value and belonging to appellee; that on or about the 18th day of April, 1883, coals were negligently dropped and sparks emitted from appellant's locomotive engine, which set fire to dry grass, weeds, stubble, rubbish, and other combustibles, which appellant negligently suffered and permitted to gather, accumulate, and remain on its road and right of way, and along its track near appellee's lands as aforesaid; that the coals dropped from such locomotive, and the sparks of fire emitted therefrom, as aforesaid, set fire to such dry grass, weeds, rubbish, and other combustible substance and materials aforesaid; and that such fire, through the medium of such combustible materials, was then and there carelessly and negligently allowed, suffered, and permitted by appellant to communicate to appellee's lands, aforesaid, and then and there burn such growing grass, a large lot of appellee's fence,—which was then and there upon his lands, and of great value,—and then and there and thereby, without fault or negligence on the part of appellee, said fire, by the negligence of appellant suffered to escape from its premises to appellee's lands, did then and there burn and totally destroy appellee's barn, and his lumber and agricultural implements therein, and the fence and growing grass aforesaid, to appellee's damage in the sum of $1000. Wherefore, etc.

It is claimed by appellant's counsel, with much apparent confidence, that this paragraph of appellee's complaint was bad on the demurrer for the want of facts, because it is not stated therein with sufficient certainty or clearness that appellee was free from fault or negligence before the fire escaped by and through the negligence of appellant from its road and right of way. Counsel says: "It will be seen that the only allegation that the plaintiff was free from contributory negligence was with respect to the actual burning of his property after the fire had escaped to the right of way, and after it had escaped from the right of way to his premises. This is not sufficient." Counsel cites, in support of his position, the case of Wabash, St. L. & P. R. Co. *v.* Johnson, 96 Ind. 40. We approve the doctrine

SUFFICIENCY OF COMPLAINT.

of the case cited, but we fail to see that it lends any support to the contention of counsel, in the case under consideration.

In the case cited the court said: "In the complaint before us, the allegation is that the fire was suffered to escape through the negligence of the defendant and without the fault of the plaintiff; but it is not averred that the loss resulted without any negligence of the plaintiff. The allegation of the pleading is confined to the act of suffering the escape of the fire, and by no rule of construction can it be extended to embrace the loss or injury."

But in the case before us, we are of opinion that by fair construction the paragraph of complaint we are now considering has stated, with sufficient clearness and certainty to withstand a demurrer, that the escape of the fire from the right of way to appellee's premises, and the burning and destruction of his property, both occurred through the negligence of appellant, and both without any fault or negligence on the part of the appellee.

Appellant's counsel also complains in argument of the court's refusal to give the jury two certain instructions at appellant's request. In the first of these instructions, the court was asked to charge the jury that if they found that the fire originated on the right of way, negligence on the part of appellant could not be inferred from that fact alone, but the appellee must prove that the fire was caused by some defect of imperfection in appellant's machinery, or by want of care, prudence, or skill on the part of its employees who had charge of its locomotive or train; and if appellee had failed to prove this by a preponderance of the evidence, they must find for appellant. There was no error, we think, in the refusal of this instruction. It proceeds upon a wrong theory. If appellant set fire to the dry grass and other combustible materials which it had negligently suffered to accumulate on its track and right of way, and, without fault on appellee's part, permitted such fire to escape to his lands and burn and destroy his property, appellant would be liable to appellee for his damages, whether such fire was negligently started or otherwise. The second instruction requested by appellant proceeds upon the same theory and is open to the same objections as the first instruction, and, for the same reasons, was correctly refused by the court. INSTRUCTIONS.

For the same reasons, also, we think there was no available error in the court's exclusion of the evidence offered by appellant, in reference to the kind of stack, fire-box, and ash-pan in use on its locomotives. The facts that appellant negligently permitted dry grass and other combustible materials to accumulate on its road and right of way, and that fire was communicated thereto from its locomotives in some manner, were shown by an abundance of uncontradicted evidence. The appellee's case, however, could not be and was not rested upon these facts, for the appellant had the right

to set fire to and burn the dry grass and other combustible materials on its right of way, but it was bound at its peril to keep such fire within the limits of its right of way. The gist of appellee's cause of action, as stated in each paragraph of his complaint, was that the appellant, without any fault of appellee, had negligently permitted such fire to escape from its right of way, and to burn and destroy appellee's property. This cause of action was sustained by sufficient evidence, and no error is manifest in the record before us, which requires the reversal of the judgment.

The judgment is affirmed, with costs.

WISE

v.

JOPLIN R. CO., Appellant.

(85 *Missouri*, 178.)

Proof of the fact of fire escaping from a passing engine and burning the property of another makes a *prima facie* case of negligence against the railroad which provides and operates the engine.

The petition in such case need only aver the substantive facts that the fire was negligently permitted to escape and burn the plaintiff's property. Under such averments the plaintiff can show the negligence of the railroad in providing safe engines and also in operating them.

The supreme court will not reverse a cause so that the plaintiff may widen his petition to conform with the proofs admitted in the case, and compel the lower court to try the identical issue again. Nor will it do so to afford a party a benefit and an advantage he has already received.

The request of the defendant that the jury be instructed to find for it, if the fire escaped from the smoke-stack, instead of the fire-box or ash-pan of the engine, *held* properly refused, although the place of the escape of the fire was alleged in the petition to have been the ash-pan and fire-box. The evidence on the trial related to the locomotive engine, in providing and operating it, and whether the fire escaped from it through the ash-pan or through the smoke-stack was immaterial, unless the defendant was prejudiced by the supposed variance, which was not the case.

APPEAL from Jasper circuit court, HON. JOS. CRAVENS, J.

John O'Day for appellant.

J. W. McAntire for respondent.

Affirmed.

MARTIN, C.—This was an action against a railroad for negligence in permitting fire to escape from its passing trains and burn the

property of plaintiff. Suit commenced February 5, 1879. It is alleged in the petition, "That on or about the said second day FACTS. of November, 1879, defendant, not regarding its duty in that behalf, did, whilst running its cars and locomotive engines upon the track of said railroad, by its servants and agents near by, and through the said tract of land of plaintiff, in the State of Missouri and County of Jasper aforesaid, so negligently and carelessly manage and control said cars and locomotive engine, that sparks of fire from the ash-pan and fire-box escaped, and by falling and lighting upon the dead grass and other combustible matter upon the track and right of way of said railroad, which defendant by its agents and servants had permitted to grow and accumulate thereon, set fire thereto, which fire so commenced and started on said track and right of way of said railroad, then and there spread and escaped therefrom and communicated to and set fire to the grass and other things standing and being on a tract of land of one Morrison adjoining thereto, and thence communicated and set fire to the fences, hedges and farm of plaintiff, and then and there burned and destroyed the following property belonging to plaintiff on said farm, to wit: One hundred and twenty rods of rail fence of the value of two hundred and fifty dollars, and one hundred and twenty rods of first-class hedge of the value of two hundred and fifty dollars, all of the value of five hundred dollars."

It is further alleged, "that the agents, servants and employees in charge of said railroad well knew that said fire had escaped and kindled in the manner as hereinbefore stated, but wholly disregarding their duty in that behalf failed and refused to extinguish said fire and to prevent its spreading, but went away and left the same burning until it communicated to the said farm of plaintiff and destroyed said property as aforesaid." To this petition the defendant made answer by general denial. The case was tried by a jury.

Some nine or ten witnesses were examined in behalf of plaintiff, in chief and in rebuttal. These witnesses testified substantially that on the 2d of November, 1873, near Carl Junction, a freight train of the defendant was going south; that its progress there was up a slightly rising grade; that on the defendant's right of way and between the tracks of its road there was dry grass, varying from six to twelve inches in height; that immediately after the train passed, the grass in two or three places on the track, as well as on the west side of it, was seen on fire; that it started right from the track and moved with the wind, which was blowing quite a gale towards the southwest; that before the train passed entirely by, the fire had spread half the length of it; that the trainmen could have seen it; that the train was not slackened nor whistle blown nor bell rung; that in twenty or thirty minutes it made its way into the fields on the west side of the track; that after crossing two roads and going over the premises of one Morri-

son it reached the plaintiff's farm, which was on the west side of the road, and burned eighty rods of rail fence and eighty rods of hedge fence; that no fire was seen on the east side of the road till the next day. Witness Lane testified: "I was just east of the railroad when the fire occurred; it seemed to me that the fire came up in the wake of the train. It rather left the track and went southwest. I think it started forty or sixty rods from where I was." Witness True, who was within thirty rods of the train when it passed, said that he had just crossed the track from the east side; that before the train came up he saw the place where the fire started; that he saw the fire itself on the track, or close to it, on the west side of it, as soon as the train had passed.

On the part of the defendant evidence in contradiction of the case contained in plaintiff's evidence was submitted. The conductor and engineer testified that as the train was going south on the occasion in controversy they saw no fire on the track or on the west side of the track, but that they observed a fire near some haystacks on the east side of the track; that fires were pretty frequent in the country at that time, and that it would not require long for the fire which they saw near the stacks to jump across the track and reach the plaintiff's premises. The fireman testified that he saw no fire on either side of the track when the train went south, and that his attention was not called to, nor did he see, the fire near the haystacks on the east side, but that when he returned the next day he noticed that the road was burned on both sides of the track. Evidence was submitted by defendant tending to prove that the engine, smoke-stack, fire-box, and ash-pan were constructed of the best materials and furnished with the best known appliances to prevent the escape of fire; that the engineer and fireman were experts, well trained and skilful, and that they conducted, managed and operated the engine in the most careful and skilful manner, and that no fire did escape from it on the day complained of.

The following instructions were given at the instance of plaintiff:

"1. The court instructs the jury that if they believe, from the evidence, that the Joplin R. Co., on or about the second day of November, 1878, while running its locomotive steam-engine and cars on the line of road in Jasper county, Missouri, through its servants, agents, and employees, permitted the sparks and fire to escape from its engine and set fire to the grass along and by the side of its line of road, and damage ensued to plaintiff as alleged, then the jury may infer or presume that the fire escaped through the negligence of the defendant, its servants, agents, and employees. And the court instructs the jury that in such case it devolves upon the defendant to rebut the presumption of negligence by proving that it was at such time using proper and safe locomotive and

engine, and that its employees and servants were conducting them in a proper and safe way at the time the fire escaped, and unless the jury believe that the defendant has rebutted this presumption they will find for the plaintiff.

"2. The court instructs the jury that defendant in this case is bound to a degree of care and diligence in proportion to the degree of danger and the probable extent of injury to the property of others in case of negligence, and if the jury believes that, on or about the second day of November, 1878, the defendant, Joplin R. Co., through its agents and employees, while operating its engines and trains of cars over the line of road in Jasper county, Missouri, failed to exercise that degree of care and caution they ought to have done under the circumstances, in consequence of which fire escaped from the engine of the train in their use, and set on fire the dry grass and combustible matter acccumulated and standing alongside and by the railroad track, and thence by its natural extension communicated to and burned the property of plaintiff as alleged in his petition, they will find for the plaintiff."

Of its own motion the court gave the following instructions:

"1. The inference that because fire escaped from defendant's engine, which damaged the plaintiff, the defendant was guilty of negligence, is fully rebutted, that is, overcome, by the defendant's showing, to the satisfaction of the jury, that it used the best machinery and contrivances to prevent the escape of fire, and that careful and competent servants were employed by defendant, and if such inference of negligence is overcome by the evidence of defendant that it had the best machinery and appliances and careful and skilful servants, as aforesaid, then plaintiff cannot recover unless the plaintiff has proved to the satisfaction of the jury other acts of negligence of the defendant which caused the escape of the fire."

"2. The court instructs the jury that, to entitle the plaintiff to recover, he must prove to the satisfaction of the jury: First, that the fire which caused the damage to plaintiff's property was set out and caused by the escape of fire from the fire-box or ash-pan of defendant's engine, and, second, that the escape of such fire was caused by or was the result of the negligence of defendant's agents, and if the jury believe from the evidence that defendant's engine was provided with the best appliances in common use, to prevent the escape of fire, and was managed and run by a careful and competent engineer and fireman, who exercised due and careful precaution to prevent the escape of fire, then the plaintiff cannot recover unless the jury believe the defendant or its employees were guilty of actual negligence."

The court refused, at the instance of defendant, to declare that as matter of law the case made by plaintiff was overthrown by the evidence of defendant, and that the jury upon the evidence should

find for defendant. It refused to instruct that the plaintiff could not recover if the fire escaped through the smoke-stack and not through the ash-pan or fire-box. It, also, refused to instruct that the one fact alone that the fire escaped from the engine and set out the fire that did the damage would not entitle plaintiff to recover. The jury returned a verdict for plaintiff in the sum of one hundred dollars. From the judgment on this verdict the defendant appeals.

The law governing this class of cases is so well settled in this State that it only necessary to lay this case alongside of the most recent decisions of this court in order to dispose of the appeal. It is claimed by defendant that this petition fails to state a cause of action. That objection is answered by a reference to the case of Palmer *v.* Railroad, 76 Mo. 217, in which a petition almost identical with this was held to be sufficient. As the principal ground of objection to the action of the court below, it is urged that the only pretended case of negligence stated in the petition consists of negligently running and controlling the engine so as to permit fire to escape; and that negligence in failing to provide a properly constructed and equipped engine is not mentioned at all, and that it was error in the court to submit any such issue to the jury. The ability and ingenuity with which the objection is argued by the counsel for the defence go so far toward demonstrating its logical correctness, that I would be inclined to approve it and reverse the case, if I were not satisfied that no practical good could result from such action, and that no actual injustice has been inflicted upon the defendant in the rulings of the court below, or in the verdict of the jury. It was at one time intimated in this State that the fact that fire was permitted to escape from a passing engine and consume the property of another, was not a fact from which negligence could be inferred. Smith *v.* Railroad, 37 Mo. 287. But the language and reasoning of the case containing this intimation has been denied, and it is now the settled doctrine of this State that the sole fact of fire escaping from a passing engine and burning the property of another raises a *prima facie* case of negligence against the company which provides and operates the engine. The citizen whose property is consumed is not in a position to easily ascertain whether the engine emitting the fire is properly constructed or equipped, or whether it is properly managed and controlled at the instant of the injury. Its swift transit affords no opportunity for inquiry or investigation. The facts of care and diligence which go to exempt the road from liability are peculiarly within the knowledge and command of its officers and managers. Accordingly the burden of rebutting and disproving the negligence which the escape of fire implies is placed upon the company, where it naturally belongs. This *prima facie* case of negligence can be rebutted by evidence that the engine from which the fire escaped was properly constructed and equipped, and that it was operated

SUFFICIENCY OF PETITION.

carefully and skilfully by competent employees. Such I understand to be our present law. Fitch *v.* Railroad, 45 Mo. 322; Bedford *v.* Railroad, 46 Mo. 457; Coats *v.* Railroad, 61 Mo. 38; Haley *v.* Railroad, 69 Mo. 614; Poeppers *v.* Railroad, 67 Mo. 716; Kenney *v.* Railroad, 70 Mo. 244; Palmer *v.* Railroad, 76 Mo. 217; Redmond *v.* Railroad, 76 Mo. 550.

It must follow from the law of these cases that the pleader in bringing his action need state only the substantive facts that the fire was negligently permitted to escape and burn the plaintiff's property. It is, therefore, unnecessary for him to allege that the fire escaped by reason of negligence in providing a safe engine, or negligence in operating the engine provided. Such allegations are superfluous, because the substantive fact of an escape of fire from it so as to ignite neighboring property implies that the negligence must have happened in either or both of the two ways alluded to, viz., in providing safe engines or in operating them. The allegation of the substantive fact in the petition advises the company of the necessity of repelling the inference of negligence by proof that the engine was properly constructed and that it was skilfully operated, thus leading to the conclusion that the accident was unavoidable and not the result of negligence. A pleader only runs the risk of narrowing the basis of his case when he goes beyond the necessary and substantive fact and indicates that the fire escaped by reason of negligence in operating an engine, and says nothing about any negligence in providing one properly constructed and equipped. The petition in this case is open to this objection and criticism.

But there are two reasons which forbid a reversal of the case on this account. The first one is that petitions identical with this one, so far as this point is concerned, have been treated as including within their scope and meaning negligence in providing machinery, as well as negligence in operating it, and as sufficient to put the defendant upon proof of care and diligence in both respects in order to repel the inference of negligence. Palmer *v.* Railroad, 76 Mo. 217; Redmond *v.* Railroad, 76 Mo. 550; Kenny *v.* Railroad, 70 Mo. 253. The other one is that the defendant at the trial was, without objection from plaintiff, allowed to introduce all its evidence in respect to the perfection and efficiency of its engine, as well as the care and skill with which it was operated. It thus appears that the material issue of negligence, which lies at the basis of this class of cases, in its unrestricted scope and meaning, went to the jury and was tried by the jury, and I do not think it would be just for the appellate court to reverse the case so that the plaintiff might widen his petition to conform with the proofs admitted in the case, and compel the lower court to try the identical issue again. There is no reason to presume that this correction would produce a different result at another trial. And

while this action might perhaps be a proper tribute to the logic of the law, I am satisfied that it is not required by the justice and merits of the case.

The instructions given in this case seem to follow the language of instructions which have been approved in several cases of the same character, and I see no material objection to them. The request of the defendant to instruct, as a matter of law, that the plaintiff's case of negligence was rebutted by the defendant's evidence was properly refused. The evidence of plaintiff in chief and in rebuttal made considerable more for him than the bare fact that fire escaped and burned his property. There were other facts tending to strengthen the *prima facie* case, which I need not stop to rehearse. Under the decisions of this court the issue was properly submitted to the jury. Palmer *v.* Railroad 76 Mo. 217; Kenny *v.* Railroad 70 Mo. 243. The request of defendant that the jury be instructed to find for defendant if the fire escaped from the smoke-stack instead of the fire-box or ash-pan, was not erroneously refused. It is true, that the place of escape from the locomotive engine is alleged in the petition to have been the ash-pan and fire-box. The negligence on trial related to the locomotive engine, in providing and operating it. Whether the fire escaped from it through the ash-pan or through the smoke-stack, is immaterial, unless the defendant has been prejudiced by the supposed variance. It was the locomotive engine in both events, and these are only different parts of it. That defendant has not been prejudiced by the supposed variance is apparent from the record. It seems to have accepted the escape of sparks from the smoke-stack as within the issue on trial, and, without objection from plaintiff, it submitted testimony tending to controvert the fact, by proving that the smoke-stack was of the most approved pattern, and that sparks did not escape from it. The plaintiff submitted no evidence expressly bearing upon the point, but rested upon the facts recited by us as tending to prove that the fire was caused by defendant in providing and operating its engine. The defendant could not have had a fairer trial, on the issue, than it has had, if the petition at the trial had been so amended as to have expressly charged an escape from the smoke-stack. Under these circumstances it will not do to reverse the judgment and remand the cause so as to afford the defendant to have a benefit and advantage which it has already received. There is nothing in the case upon which a different result could be predicated.

INSTRUCTIONS.

Upon the whole I am of the opinion that the judgment should be affirmed. The other commissioners concurring, it is so ordered.

SEELEY, Respondent,

v.

NEW YORK CENTRAL AND HUDSON RIVER R. Co. Appellant.

(*Advance Case, New York. June* 8, 1886.)

Where there is a conflict of evidence as to whether the fire producing the damages complained of was caused by an engine upon defendant's road which was fully protected in respect to fire-screen, or by another engine passing at about the same time with a defective fire-screen, it becomes a question of fact for the jury to determine which engine caused the fire.

APPEAL from a judgment of the general term, affirming a judgment in favor of plaintiff entered upon the verdict of a jury. Action to recover damages alleged to have been caused by a defective spark-arrester on one of defendant's locomotives passing the property burned shortly before the fire occurred.

William H. Adams for appellant.

Stephen K. Williams for respondent.

PER CURIAM.—The principal question involved in this case is whether the negligence of the defendant caused the barn of the plaintiff to be set on fire. There was a conflict in the evidence in regard to the fact whether the engine which caused the fire was sufficiently guarded by a screen on the top of the smoke-stack which prevented coals of fire from escaping.

The defendant's counsel claims that the fire was caused by one of two engines passing at about the time of the fire, and which engines were both fully protected in respect to fire-screens.

An examination of the testimony discloses that it is not entirely clear whether the fire was caused by either of the two engines mentioned or by another which was not properly guarded so as to prevent the escape of coals of fire.

Harriet Burley, a daughter of the plaintiff, testified: "Some five or six of defendant's locomotives passed there that morning before the fire, going in both directions. . . . There were trains passing there frequently that morning. Trains do frequently pass there without my noticing them. . . . The trains I have mentioned are the only ones I noticed within half an hour previous to the fire."

Mrs. Seeley, plaintiff's wife, testified: "Had seen a number of trains of defendant's cars passing there shortly before I discovered the fire. Fifteen or twenty trains passed there that morning, more or less. . . . I didn't notice any train until after I saw the smoke. . . . I was at work in the kitchen just before I discovered the fire. I hadn't been giving attention to the trains. The last train I

noticed before the fire was the work-train. These three were the only locomotives I noticed."

Thomas Cram, a conductor for the defendant, testified that an empty engine went west about the time of the fire, about fifteen or twenty minutes before they were called to the fire; that there were some fires after that engine passed; that he saw several fires immediately after it had passed.

There was no proof given as to the condition of this engine as to the fire-screen, but there was some evidence that the fire-screens on the other two engines spoken of were in good order. It is, however, nowhere shown that the fire was caused by either of the last two mentioned engines. On the contrary, it is shown that it may have been caused by some other engine, the fire-screen of which was not in perfect or even good order, as many of them had holes cut in to make better draft.

It will thus be seen that it is by no means conclusive that the fire was caused by either of the two engines, which it is claimed were in perfect order, and as the case stood it would be a question of fact for the jury to determine which engine caused the fire.

There is no other question in the case which requires attention. The judgment should be affirmed.

All concur.

Judgment affirmed.

MILLER

v.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN R. Co.

(*Advance Case, Missouri. December* 20, 1886.)

A railroad company which is liable for damages caused by the burning of plaintiff's fence round a cornfield is also liable for the destruction by cattle of the corn formerly inclosed by the fence, and left exposed to their depredations by its destruction.

APPEAL from circuit court, Stoddard county.

Action for damages. Judgment for plaintiff. Defendant appeals.

D. H. McIntyre for respondent, Miller.

T. J. Portis for appellant, St. Louis, I. M. & S. R. Co.

SHERWOOD, J.—The petition in this cause, so far as necessary to copy it, is as follows: "Plaintiff further states that the defendant

was the owner, and had possession and control, of the premises adjacent to the premises of this plaintiff, and used and occupied the same in running and operating its said road. Plaintiff further states that defendant criminally and negligently permitted and allowed the premises, so owned and occupied by it, to and adjacent to plaintiff's, to grow up in grass, and permitted the same to dry and become inflammable matter. Plaintiff further states that on said first day of September, 1881, at the county of Stoddard and State of Missouri, and at the time defendant was engaged in running and operating said railroad, the defendant did, by its agents, servants, and employees, while running a railroad engine of defendant's, by means of fire as aforesaid, between the town of Poplar Bluff and to and beyond the town of Dudley, in Stoddard county, Missouri, set fire to the fence of plaintiff, and the inflammable material permitted by defendant to grow and become inflammable upon the premises of defendant, at a place near the said town of Dudley, and at a point where the premises of said defendant joined to those of this plaintiff, by sparks of fire escaping from the engine of defendant run and operated by its agents and servants, and by reason of the neglect and failure of defendant to equip said engine with mechanical contrivances employed and constructed to prevent the escape of fire. Plaintiff further states that, by reason of the fire so kindled, and by reason of the neglect of the defendant to remove the said inflammable matter at the point or place aforesaid, and by reason that the defendant failed to prevent the scattering of fire from its engine by the use of mechanical contrivances to prevent the escape of fire, his fencing of the value of one hundred dollars, that inclosed the above-described premises, were set on fire by the defendant and burned up, and thereby leaving his crop exposed and unprotected from destruction by cattle and hogs and other stock. Plaintiff further states that there was, at the time, standing and growing upon the premises forty acres of corn, of the value of three hundred and fifty dollars, all of which corn and property of plaintiff was, by reason of the destruction of said fencing, caused by the neglect of defendant aforesaid, injured and destroyed by cattle, hogs, and other stock. Wherefore plaintiff prays judgment against said defendant in the sum of four hundred and fifty dollars, and for his costs of suit."

FACTS.

It will be observed that the petition, in substance, charges that the damage done to the plaintiff's property resulted from the escape of fire, which escaped by reason of the neglect of the defendant to provide suitable mechanical contrivances to prevent the scattering of fire by its engine, and by reason of the neglect of the defendant to remove the dry grass on its right of way. Under the rulings of this court, a *prima facie* case of negligence on the part of a railway company to provide suitable mechanical contrivances to prevent the escape of fire is made out

PRIMA FACIE CASE—ONUS.

when it is shown that fire escaped from such engine, and caused the fire in question; thus throwing the onus on the defendant to establish that notwithstanding that fire did escape, as it sometimes will, that the best mechanical contrivances were supplied by defendant to prevent such an occurrence. Fitch *v.* Railroad Co., 45 Mo. 332; Bedford *v.* Railway Co., 46 Mo. 456; Clemens *v.* Railroad Co., 53 Mo. 366; Coates *v.* Railroad Co., 61 Mo. 38.

In the case at bar the proof is direct that a train of defendant's passed, "strewing fire all along;" that the fire thus escaping, set fire to the grass, and that to the fence; and in some places the fire was not more than two minutes in reaching the fence; that the grass was very dry, and burnt almost like powder—very fast. There was no evidence offered by defendant showing the use of proper appliances to prevent the escape of fire, And the instruction given on behalf of plaintiff, barring some verbal criticism, put the case fairly enough to the jury. Indeed, it may be said that the plaintiff might well have insisted upon a more favorable instruction; for, under the one given, any negligence of the plaintiff, however slight, whether relating to protecting the premises from fire, or from the depredations of stock which caused the destruction of the crop of corn, would have precluded a recovery by him. If the defendant desired a more specific instruction on the subject of plaintiff's negligence, one should have been asked; but this was not done.

The chief point of objection, however, which the defendant takes, is to the doctrine that the company is not responsible for the destruction of the crop by cattle, etc. It was in evidence that it was a good stock range around plaintiff's field, and that many horses, cattle, and hogs came into the field after the fence was burned, and, in spite of all efforts to keep them out, destroyed the crop before the fence could be rebuilt. The destruction of the crop of corn by the stock ranging round the field after the barrier of the fence was removed by fire was just as natural a result, and one to be as much expected, as that the fire would destroy the fence in the first instance. Had the fire destroyed the crop of corn, no one would doubt that, under our rulings, the plaintiff could recover. The case is the same in principle where the *immediate* result of the fire is to remove the only intervening obstacle between the stock and the crop, as where the *natural* result of such removal is as disclosed by the evidence here. No one who has ever lived in the country would need to have this view of the subject pressed upon his attention. And it is sufficient if the injury is the natural, though not the necessary or inevitable, result of the negligent fault. Shear & R. Neg. § 596.

DESTRUCTION OF CROP BY CATTLE.

In Kellogg *v.* Railroad Co., 26 Wis. 223, it has been ruled, in a very able opinion by Dixon, C.J., that the maxim *causa proxima*, etc., includes not only liability for all natural and probable injuries

having origin in the wrongful act or omission, but such injuries as are likely, in ordinary circumstances, to ensue from the act or omission in question. And it has been ruled in England that it is not necessary to a defendant's liability, after you have established his negligence, to show, in addition thereto, that the consequences of the negligence could have been foreseen by him. Smith *v.* Railroad Co., L. R. 6 C. P. 21. And to the same effect is a case in Massachusetts, Higgins *v.* Dewey, 107 Mass. 494; cited Whart. Neg. § 20.

The fifth instruction asked for defendant has already been disposed of by remarks made as to the *prima facie* case made by plaintiff by showing the escape of fire.

The fourth instruction asked on behalf of defendant was properly refused because of no evidence on which to base it. From all that appears in evidence the loss of the rails was the loss of the plaintiff.

As to the other instructions asked on the part of the defendant, i. e., 2 and 3, so far as proper to be given, they were embraced in the instruction given at plaintiff's instance; and there was evidence sufficient to go to the jury tending to show that plaintiff used all proper diligence in keeping his crop from being destroyed, and that, owing to the length of fence destroyed, it was scarcely within the bounds of ordinary human achievement, at least without running to an expense more than the crop probably would have been worth, to have guarded it until the fence could have been prepared.

Tested by the authorities cited, the case was tried on the correct theory, and the judgment is accordingly affirmed.

All concur.

NICHOLS

v.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA R. CO.

(*Advance Case, Minnesota. February* 28, 1887.)

The plaintiff's buildings, alleged to have been destroyed by fire negligently communicated by one of defendant's engines, were insured at the time, and after the commencement of this action, the amount for which they were insured was received by plaintiff. *Held*, that the action might properly be continued and prosecuted to judgment by plaintiff.

Evidence in plaintiff's behalf *held* sufficient to raise a presumption of negligence on the part of the defendant; and the question whether, under the circumstances disclosed, such presumption was rebutted by the testimony of defendant's witnesses, was for the jury.

APPEAL from district court, Scott county.

Lorin Cray, J. D. Howe, and *C. D. O'Brien*, for Chicago, St. P., M. & O. R. Co., appellant.

Benton & Roberts for Nichols, respondent.

VANDERBURGH, J.—1. The plaintiff's buildings, destroyed by fire alleged to have been communicated by one of defendant's locomotive engines, were insured at the time, and the amount of the loss covered by the insurance policy was received by plaintiff since this action was commenced. The defendant claims that the insurance company thereby acquired an interest in the cause of action herein, and should have been made a party. Whether it did in fact acquire any such interest we do not consider, since by the terms of the statute this action might in any event proceed to its conclusion without the necessity of any change or substitution of parties. Gen. St. 1878, c. 66, § 41.

INSURANCE COMPANY AS A PARTY.

2. In respect to the points made, that the verdict and special findings in this case are unsupported by the evidence, and that the court erred in refusing to dismiss the action on that ground, we think the evidence in the plaintiff's behalf, tending to show when and where the fire caught in the grass between the right of way and plaintiff's house, and the manner in which it spread to and ignited the building after the train passed, in connection with the fact that, under the influence of a strong north wind blowing at the time, any sparks thrown from the engine would necessarily be carried in that direction was sufficient to make a case for the jury, and these questions cannot properly be reconsidered in this court. And the same thing must be said as respects the alleged contributory negligence of the plaintiff in leaving his premises exposed to such dangers. The jury, on this last point, might properly take into consideration the fact that the house was about 10 rods distant and upwards of 40 feet above the right of way, and upon a high stone foundation, and the degree of liability of its being destroyed from such cause, especially if the engines of the company were operated with reasonable care.

SPECIAL FINDING—EVIDENCE.

3. It is very earnestly insisted, however, that the evidence of the defendant's witnesses so completely established the absence of any negligence on its part, as respects the management, character, or condition of the engine by which the alleged fire was communicated that the trial court should have directed a verdict. The trial court is so far satisfied with the verdict in the case that it has refused to set it aside as against the weight of the evidence. If it had done so in the exercise of its discretion, we should certainly have found nothing to criticise in such action; but, as the case stands, we are to consider the question whether, as matter of law, the presumption of negligence

ABSENCE OF NEGLIGENCE.

arising from the fact that the fire was kindled by the engine appears to have been so clearly overcome by the evidence of defendant's witnesses as to leave nothing for the jury in the case. We are enabled so to decide. The witnesses on this question were employees of the company, whose acts or omissions were the subject of inquiry, and the jury were to judge of the weight and credibility of their testimony under the circumstances.

The engineer who operated the engine in question was examined as an expert on the defendant's behalf, and, among other things, testified, in general terms, that he operated it in a careful manner on this occasion, and in the ordinary way, as he had for years. It was hauling a freight train of 28 cars on an up-grade at this point. He testified that the engine was not laboring very hard—not so hard as at many other places on the road—but that in such cases "the harder it works the more it blows the smoke and cinders" through the smoke-stack, but that in respect to the emission of sparks a great deal depends upon the speed of the train. He was using Iowa soft coal, and had been on the road with the engine about ten hours at the time. It is evident, we think, that this witness did not have any special or distinct recollection as to the manner he operated the engine with respect to any apprehended danger from fires on the occasion referred to. He managed it in the ordinary way. But special care is required to be exercised to meet the exigencies of special circumstances; and the draught, pressure of steam, and speed of the train must be regulated accordingly. He also explained that the object and effect of the cone suspended in the smoke-stack is to break up the sparks and cinders so fine that only very small sparks and cinders can get through the netting; and upon the cross-examination he stated that he had never known this engine to set fires, and if it did throw sparks, and set fires, it must have been out of repair. This statement he persisted in upon his re-examination by the defendant's counsel, only qualifying it subsequently by saying that it depended on the proximity of combustible matter. Evidently he intended the jury to infer that the sparks were made too fine to kindle fires. In this particular instance, assuming the fact to be, as the jury must have found, that the fire was in fact kindled by cinders thrown from the engine upon defendant's land beyond the right of way, the evidence of this witness did not conclusively rebut the presumption of negligence in handling the engine under the circumstances, viz., the presence of a strong wind, a heavy train on an up-grade, and an adjoining field of combustible grass. The degree of care to be exercised in any particular case must be regulated by the danger reasonably to be apprehended. Grand Trunk R. Co. *v.* Richardson, 91 U. S. 469. The special finding of the jury, therefore, that the fire which escaped from defendant's engine was communicated to and destroyed plaintiff's property, because the engine was negligently

managed, is sustained by the record. And this is an independent finding, sufficient by itself to support the general verdict.

The inspectors testify that they examined the netting, smoke-stack, and cone on and before the day of the accident, and found them in good condition. The testimony of one of them is that on the next morning he was specially directed to look over this engine carefully, and that he did examine it twice. We think it questionable whether, in the face of the evidence of its subsequent condition, the special findings as to its being defective and out of repair, based on the statutory presumption of negligence, can be supported. But, for the reason stated, this question, and others arising upon the rejection of evidence upon the same issues, need not be considered. Nor can we assume that the special findings on those points influenced the judgment of the jury upon the determination of the question of the negligent or careful management of the engine, which was determined wholly upon the evidence of the engineer, who had no knowledge that it was not in good order, and operated it as he usually did.

4. There was, we think, sufficient foundation laid for the evidence of the witness Chadderton, of the value of the buildings destroyed. He was a carpenter, had some knowledge of them, and had heard the testimony of other witnesses describing them in the condition they were in when destroyed. The value of his testimony, after it was sifted upon cross-examination, was for the jury.

5. The property destroyed was situated between Jordan and Belle Plaine, and near the latter village. A witness called to prove the value of grain burnt in one of the buildings stated that he was a farmer and sold grain, and knew the value of wheat and corn in the vicinity of Belle Plaine in May, 1885 (though he marketed his own at Jordan), which he testified was 70 to 72 cents per bushel for No. 1 wheat, and 40 cents for corn. The evidence as to value was objected to on the ground that no foundation was laid for it. We think there was no abuse of discretion in allowing the witness to testify. It had been previously proved, without objection, that the wheat was worth about two thirds as much as good first-class wheat.

The defendants excepted to certain paragraphs of the charge of the court, which in themselves are inaccurate and subject to criticism; but, taken in connection with the entire charge, and the requests asked by the defendant, which were given, no prejudice could have resulted, particularly in view of the special finding of fact by the jury which necessarily controlled the disposition of the case.

Order affirmed.

KALBFLEISCH *et al.*, Respondents,

v.

LONG ISLAND R. Co., Appellant.

(*Advance Case, New York. June* 1, 1886.)

Acquisition of land for the purposes of a railroad does not embarrass the right of the owner of adjoining lands not taken in the freest use of them in any lawful business, nor expose him to be charged with contributive negligence if his property of an inflammable nature, necessarily and carefully used in the course of such business, is set afire by sparks from a defective or unskilfully managed locomotive.

APPEAL from a judgment of the city court of Brooklyn at general term, affirming a judgment in favor of plaintiffs in an action to recover damages for injuries alleged to have resulted to property through defendant's negligence. Affirmed.

The facts are stated in the opinion.

Alfred C. Chapin and *William J. Kelly* for appellant.

William N. Dykman for respondents.

DANFORTH, J.—The defendant at the close of the plaintiffs' case moved the trial judge to dismiss the complaint upon the ground "that the taking out of the inflammable benzine was contributive negligence. Also, that there is no evidence that the fire came from the defendant's engine." The motion was denied, and an exception then taken raises the only question we can consider. FACTS.

It appeared that the plaintiffs were the owners of certain buildings in Brooklyn, adjoining the tracks and station of the defendant, which they leased to one Lewis Kupper.

In September, 1882, the latter was engaged in making black varnish, and had commenced thinning it down with benzine. It was giving off vapor. At that time defendant's train stopped at the station to let off its passengers, "when," according to one witness, "she started off again and commenced to puff," and, he says, "I saw a flash come from the engine right into the kettle and it was all on fire;" "the train had just got in front of our place, when it catched on fire;" "I looked up," he says, "and the vapor was afire."

This was about 1 o'clock, The fire on plaintiff's premises had been extinguished at 11, and there was no fire in the neighborhood, except as it was emitted from the locomotive.

That its condition permitted this escape was established by its engineer, who testified that the wire netting of the smokestack was out of order. "It was," he says, "split lengthwise of the smoke-box about a foot and a half, and through working the engine it opened it out and made a space there I should say very near a foot wide and a foot and a half long open in the netting; this netting is supposed to be a spark-arrester; it is right underneath the smoke-stack on the upper part of the smoke-box, under the stack on the inside of the smoke-box; that was the only thing there was there to arrest the sparks; I know of this engine having set fire to lots of fences and one thing and another along the road that I know of; I knew it would set fire to fences about the beginning of September or the latter part of August of the same year."

On cross-examination by defendant's council, he testified that a week before the fire he reported this break, when it first occurred, to the master mechanic, and after the fire it was patched up.

"The effect of such a hole as I have described would be that all the sparks would come through the flues and would escape through the opening, where if the vent was closed the sparks would be arrested. I think it would increase the amount of sparks thrown largely—more or less; it increased the sparks coming out of this engine."

This was the condition of the case when the motion referred to was made, and it is a complete answer to it unless the mere location of a railroad and its use are to operate as an absolute prohibition upon certain branches of industry in its vicinity. By purchase such dominion might be acquired, but that is not pretended.

USE OF PROPERTY ADJACENT TO RAILROAD.

In Fero *v.* Buffalo, etc., R. Co. 22 N. Y. 215, the court found it difficult to maintain the proposition that one could be guilty of negligence while in the lawful use of his own property upon his own premises; but in the case before us the claim is advanced that the mere taking out and use of an article necessary in the manufacture carried on upon plaintiffs' premises put them beyond the protection of the law.

In view of the fact that no impediment was offered to the freest discharge of sparks from defendant's engine, and the testimony of the eye-witness that the fire causing the injury came from it, the two grounds upon which the defendant sought to arrest this case were equally untenable. Fero Case, *supra;* Cook *v.* Champlain Trans. Co. 1 Denio, 91.

The exception is therefore unavailing. But the record shows that the plaintiffs afterwards gave evidence, and the case was submitted to the jury in a manner satisfactory to the defendant, and in the absence of any request for a further charge it must be presumed that the instructions given covered every point then thought

by the defendant to be material. No exception other than the one above referred to was taken at the trial.

The judgment appealed from should be affirmed.

All concur.

Lumber Near Track Burned.—A railroad company constructed a siding near one of their stations to facilitate the shipment of freight. A lumberman, accustomed to load cars at this siding, placed a large amount of lumber near the track, partly on the railroad company's right of way, and partly on ground hired for the purpose, in order that the lumber might be ready for shipment as required and as cars were furnished, and also (as reasonably appeared from the evidence) for storing and seasoning the lumber. This lumber caught fire from sparks thrown out by a locomotive engine running on the road, in an extremely dry season when fires were of frequent occurrence. In an action by the owner of the lumber against the railroad company to recover damages for the loss thus occasioned, the above facts appeared from the plaintiff's testimony, and the court entered a nonsuit.

Held, that, conceding the loss to have been occasioned by the negligence of the defendant, nevertheless, the plaintiff, having placed his lumber in a dangerous place with a full knowledge of the danger, was guilty of contributory negligence, and the nonsuit was therefore rightly entered. Post v. Buffalo, Pittsburgh & W. R. Co., 108 Pa. St. 585.

PFAFF, Auditor, etc., *et al.*

v.

TERRE HAUTE AND INDIANAPOLIS R. CO.

(*Advance Case, Indiana. November* 5, 1886.)

Under the revenue laws of Indiana, lands occupied by a railroad company with its main track, side tracks, depot, round-house, coal-sheds, and water-tanks are to be valued and assessed by the state board of equalization as "railroad track," and cannot be assessed by the local authorities.

APPEAL from Marion superior court.

C. S. Denny, W. A. Ketcham, and *I. Klingensmith* for appellant.

Harrison, Miller & Elam for appellee.

ZOLLARS, J.—Appellee owns, and for a number of years has owned, some small tracts of land, and some lots and parts of lots in the city of Indianapolis, aggregating about 12 acres. The purposes for, and the manner in which, those lots are and have been

used are stated in its complaint as follows: "Plaintiff shows that upon the above-described portion of block 94 is situated its freight-house, through which two tracks run, and on each side of which there are tracks belonging to plaintiff, connected with its main line of track situated on Louisena street, in said city of Indianapolis; that upon said part of outlot 135 plaintiff has constructed a round-house for its locomotives, a small shop for repairing locomotives, a coal-shed, a wood-shed, and some water-tanks; that the balance of said outlot 135, together with all the other real estate above described, except a portion of block 94, is occupied by the main track and side tracks of this plaintiff, and is used exclusively for track purposes." It is further alleged in the complaint that in 1880 and 1881 the railroad company made return of its main track, and all of said side tracks upon the said lands and lots, to the state board of equalization, and that that board valued and assessed the same for taxation, consisting of .56 of a mile of main and 8.15 miles of side tracks, including the lands and lots upon which they were situated, and all the improvements thereon, as "railroad tracks;" that upon the valuation thus made by the state board the respective officers of Marion county and of the city of Indianapolis extended all taxes levied by the county and city respectively, and that the taxes so levied have been paid. It is still further alleged that, notwithstanding the assessment as above stated, and the payment of the taxes, the county and city, by their local assessors and officers, in each of said years, made an assessment of the above-described lots and lands, together with the improvements, and levied taxes thereon, claiming that they are not included in the term "railroad track," and that, therefore, they may be assessed and taxed by the county and city authorities as other lands are assessed.

Facts.

The railroad company having refused to pay the taxes so assessed by the local authorities, the lots and lands were sold by those authorities. This action against the proper city and county officers, and the purchaser at the tax sale, is to enjoin the execution of a deed to the purchaser, to enjoin any further attempt to collect such taxes, and to quiet its title to the lots and lands.

The question presented by the record is, are the lots and lands so occupied with tracks, side tracks, and buildings to be valued and assessed by the state board of equalization as "railroad track," or may they be valued and assessed by the county and city authorities as other lands are assessed? The answer to this question is dependent upon the construction to be given to our revenue laws. As there is no material difference between the revenue acts of 1872 and 1881, so far as they affect the question under examination, we shall make reference only to the act of 1881, and to the sections as numbered in Rev. Stat. 1881. It is very plain that

Question.

under the revenue acts the state board of equalization alone has authority to value and assess the railroad property denominated "railroad track" and "rolling stock." Section 6410. The important question here is, what is included in the term "railroad track"? Does that term include the land described in the complaint, being small tracts of land and lots which are occupied by side tracks, turn-outs, round-house, a small repair-shop, coal and wood sheds, water-tanks, and turn-tables, etc.?

Section 6362 provides that "such right of way, including the superstructures, main track, side or second track, and turn-outs, turn-tables, telegraph poles, wires, instruments, and other appliances, and the stations and improvements of therailroad company on such right of way (except machinery, stationary engines, and other fixtures, which shall be considered personal property) shall be held to be real estate, for the purpose of taxation, and denominated 'railroad track,' and shall be so listed and valued; and shall be described in the assessment thereof as a strip of land extending on each side of such railroad track, and embracing the same, together with all other stations and improvements thereon, commencing at a point where such railroad track crosses a boundary line in entering the county, township, city, or town, tending to the point where such track crosses the boundary line leaving such county, township, city, or town to the point of termination in the same, as the case may be, containing ——— acres, more or less (inserting name of county, township, city, or town, or boundary line of same, and number of acres and length in feet); and, when advertised or sold for taxes, no other description shall be necessary to convey a good title to the purchaser."

This section provides that the right of way, with whatever is upon it in the way of improvements, is to be valued and assessed as "railroad track." If a depot building, round-house, machine-shop, coal or wood shed, or water-tank, is upon the right of way, they become a part of the railroad track, and are to be valued and assessed by the state board of equalization, and cannot be valued and assessed by the county or city authorities as separate and apart from the "railroad track." The more specific inquiry here is, do the lots and lands described in the complaint, and occupied as therein described, constitute a part of the right of way?

The term "right of way" is not limited by any statutory definition, nor by any statutory provision, to a strip of land of any particular and definite width at all points on the line of the railroad. As applied to a railroad company, it means a way over which the company has the right to pass in the operation of its trains. Williams *v.* Railroad Co., 50 Wis. 76; s. c., 5 N. W. Rep. 482. A railroad cannot be operated with anything like success with a single track. It is necessary to have either a

RIGHT OF WAY —MEANING.

double track, or turn-outs and side tracks, in order that trains going in opposite directions may pass. It is just as necessary that there shall be turn-outs and side tracks for the making-up of trains, the changing of engines, the replenishing of them with water and fuel, and the loading and unloading of freights. With many of the more important lines, it is often necessary to have many of such turn-outs and side tracks, in order that the business may be done with dispatch, in obedience to the demands of commerce and traffic. These side tracks, such as are required at commercial centres and the larger cities and towns, could not be crowded upon a narrow strip of land, such as may be sufficient between stations. In order that the company may have the requisite amount of such side tracks at such points, it is necessary that it shall have a right of way over a sufficient amount of land upon which to lay and operate them.

This right of way the company may acquire by condemnation proceedings, if necessary. Rev. St. 1881, § 3907. When such right of way is acquired, by whatever means, the land thus acquired became a part of the company's right of way, and thus a part of the "railroad track," as much as that portion occupied by the main track. It seems reasonable, therefore, that the person, or body of persons, who value and assess the one should value and assess the other. The main track, in connection with such side tracks, make up the one system and property. To destroy one will greatly cripple and reduce the value of the other. The side tracks, and the land upon which they are located, will have a value measured by the value of the land as land, and the value of the side tracks and improvements thereon; and these altogether will add to the value of the whole line in proportion as they may afford facilities for the transaction of business over that line. The state board of equalization could not well fix a just valuation upon the railroad without a knowledge of such facilities; and hence the statute requires the railroad company to furnish annually sworn statements to the county auditors of the several counties through which the road may run of the amount of the main, and all second, tracks, side tracks, and turn-outs in the county. The amount of each thus reported to the auditors they are required to report to the auditor of state. Section 6407. The statute also requires that the railroad company shall report to the auditor of state the length or the main track, side or second tracks, turn-outs, and the number and quality of buildings or other structures on "railroad track," showing the proportion in each county and township. Section 6369. Both of these statements thus received the auditor of state is required to lay before the state board of equalization. Section 6371. If that board is not to value and assess the side tracks thus reported, the reporting of them would be an idle ceremony, except as they may be considered in fixing the value of the main line.

All of the tracks thus reported are to be valued and assessed by that board as "railroad track;" and for the purpose of arriving at a just valuation it may examine persons and papers if necessary. The amounts determined and assessed upon these two items of railroad property, denominated "railroad track," are to be certified by the auditor of state to the auditors of the several counties, and they distribute the value so certified to the several townships, cities, and towns in their counties, which are entitled to a proportionate value of such "railroad track," and compute and extend taxes against such values. Section 6410.

Section 6363 more explicitly declares how the values so assessed shall be apportioned, by providing that the value of the "railroad track" shall be listed and taxed in the several counties, townships, cities, and towns in the proportion that the length of the main track in such county, township, city, or town bears to the whole length of the road in this State; except the value of the side or second tracks, all turn-outs, etc., shall be taxed in the county, township, city, or town in which the same are located. Thus the county, township, city, or town gets its proportion of the taxes assessed upon the main line, and the whole of the taxes assessed upon the side tracks and turn-outs, and the land upon which they and other improvements are located, to the extent that such side tracks, etc., are located in the county, township, city, or town.

It is argued that the portion of the above section providing that the value of such side tracks, etc., shall be taxed in the county, township, city, or town, where located, authorizes the valuation and taxation of the lands upon which the side tracks are laid, together with the other improvements thereon, by the local authorities. That conclusion does not result from the language of the section, and to give the section the construction contended for would bring it in conflict with the spirit of the act, and, as we think, lead to a confusion in the valuation and assessment of the railroad property of the character here under consideration.

Section 6364 also provides that the property denominated "rolling stock" shall be listed and taxed in the several counties, townships, cities, and towns; but that such "rolling stock" is to be valued and assessed by the state board of equalization is beyond question. Here, as we have seen, the land and lots are occupied by side tracks and turn-outs, which are used in the operation of the road. Upon these lands and lots there are also coal and wood sheds, a freight-house, water-tanks, a small repair-shop, and a round-house. Without going beyond the case to determine what might be the rule as to shops, etc., differently located, it is enough here that the buildings and improvements are all upon lands and lots which are a part of the right of way, and that such right of way, together with all superstructures and tracks, etc., thereon, is "rail-

road track," to be valued and assessed by the state board of equalization, and cannot be valued and assessed by the local authorities. In this conclusion we are sustained by the adjudications upon similar statutes.

It is claimed in argument that our statute for the taxation of railroad property is a copy of the Illinois statute upon the same subject. However that may be, it is in every material feature the same as the Illinois statute, and hence the adjudication by the supreme court of that State upon its statutes are entitled to weight in the construction of our statute.

The exact question here involved was decided in the case of Chicago & A. R. Co. *v.* People. 98 Ill. 350. The railroad company occupied 32 acres of land, with side tracks, turn-outs, etc., which were used in the making up of trains, receiving and discharging freights, etc., in the transaction of the company's business. The ground was also used for car-shops, machine-shops, blacksmith-shops, foundry, round-house, freight depot, stock yards, paint-shops, etc. It was held that the ground thus occupied was a part of the right of way, and hence "railroad track;" and that such "railroad track," with all the buildings thereon, is to be valued and assessed by the state board of equalization, and not by the local authorities. We quote from the decision in that case the following: "These shops are, doubtless, necessary, in the successful operation of the railroad; but whether they are or not is not important, as the revenue law anticipated that such structures would be erected on the company's right of way, and made express provision, when that was done, that they should form a part of the right of way, and be taxed as such. This is apparent from section 42, which declares that the right of way, including superstructures of main, side, or second track, and turn-outs, and the station and improvements of the railroad company on such right of way, shall be real estate, for the purpose of taxation, and denominated 'railroad track.' The fact, then, that the company has erected and is using shops on this land for the purpose of right of way does not, in the least, militate against the view that the land is held for right of way. Inasmuch as the exclusive power to assess railroad track and rolling stock has been conferred on the state board of equalization, there seems no reason whatever why the power of assessment of property situated as is the property in controversy should be conferred on the township assessors. The state board has many facilities for making a correct and just assessment which the township assessor cannot have. Under section 109 it has the power to examine persons and papers, where it may be necessary to reach a correct result. The locality where the property is situated gains nothing by an assessment made by the local assessor. Whether the assessment is made by

AUTHORITIES.

the township assessor, or by the state board under section 43 of the revenue act, the value of side tracks and turn-outs, station-houses, depots, machine-shop, or other buildings belonging to the road, shall be taxed in the county, town, village, district, or city in which the same are located; thus giving the locality where the property is situated the benefit of the taxes to be collected from such property, whether it is assessed by the local assessors, or by the state board of equalization." See also Chicago & N. W. R. Co. *v.* Miller, 72 Ill. 144; Chicago & A. R. Co. *v.* People, 99 Ill. 464; State Railroad Tax Cases (under the Illinois statutes), 92 U. S. 575; Union Pacific R. Co. *v.* Cheyenne, 113 U. S. 516; s. c., 5 Sup. Ct. Rep. 601; Northampton Co. *v.* Lehigh Coal & Nav. Co., 75 Pa. St. 461; Toledo & W. R. Co. *v.* City of La Fayette, 22 Ind. 262.

Our statute provides that all real estate of a railroad company other than that denominated "railroad track," with all the improvements thereon, shall be assessed by the local authorities. Section 6366. It is claimed by counsel for appellant that railroad companies cannot hold real estate other than such as is described in the complaint, and such as may be occupied by the main track, and that hence the real estate other than "railroad track," mentioned in the above section, must be such as that described in the complaint. In all this we think counsel are mistaken. Railroad companies may acquire and hold land other than that occupied by their tracks. Rev. St. 1881, §§ 3900, 3901; Toledo & W. R. Co. *v.* City of La Fayette, *supra*.

In the answer to appellee's complaint it is alleged that, in fixing the values, the state board of equalization took into consideration only the tracks, and did not consider the value of the lots and lands, and the buildings thereon, and that the local authorities valued and assessed these. It is claimed that, because of the alleged omission on the part of the state board, the local authorities had the right to make the valuation and assessment; and that, if they had not, the appellee cannot succeed in this action without first paying, or offering to pay, the taxes due. The difficulty with the contention is that, so far as shown, appellee had paid all taxes that, in any legal sense, were due. The authority to value and assess the lots and lands which constitute a part of the right of way or "railroad track" was and is with the state board of equalization alone. The local authorities have no power to value and assess such property, and any valuation or assessment that they may attempt is utterly void. The railroad company can owe no taxes upon such property, except such as may be extended upon the valuation fixed by the state board. It is to be presumed that the state board will do its duty, and value the whole of the right of way, including the land, the tracks, and superstructures, as it is alleged in

the complaint was done; but if it should fall short of its duty, as alleged in the answer, the local authorities have no power to do what that board under the law is alone authorized to do.

The city further relies upon a section in the general act for the incorporation of cities. Section 3156, Rev. St. 1881. That section is an amendment of section 58 of the act of 1867, and was passed and approved on the seventh day of March, 1873. So far as material here, the amended section provides that cities, through or into which a railroad may pass, may assess any railroad building, fixtures and machinery connected therewith, within the city limits, on the same basis, and in the same manner, that like property of natural persons is assessed, and collect the taxes thereon as other taxes are collected. Whatever might have been said as to the authorities of cities under that section, in the absence of other legislation, to value and assess buildings situated upon the right of way of a railroad company, it is clear that, under subsequent legislation, such authority does not exist. In 1875 an act was passed providing that thereafter the general laws of the State for the assessment of taxes should apply to all incorporated cities not having special charters, so far as the same should be applicable. Acts Reg. Sess. 1875, p. 149; Rev. St. 1881, § 3263. As to the assessment and taxation of railroad property, there is no difficulty in applying to cities the general laws of the State for the assessment of taxes; and the result of such an application is that the city authorities must take the valuation of the right of way of railroad companies from the state board of equalization, and have no more authority to value and assess buildings on such right of way than have the county authorities. Such authority does not exist with either.

In overruling appellants' demurrer to the complaint, and in sustaining appellee's demurrer to the answer, the court below ruled in accordance with this opinion.

The judgment is therefore affirmed, at appellants' costs.

Peoria, Decatur and Evansville R. Co., Appellant,

v.

Goar.

(*Advance Case, Illinois. October* 6, 1886.)

The right of way of a railroad, including the superstructures of main, side, or second track, and turnouts, and the stations and improvements of the railroad company on such right of way, shall for the purposes of taxation, be held to be real estate, and denominated "railroad track," and shall be assessed by the state board of equalization. Its assessment by the local township assessor is void.

Where, by mistake, property was listed on schedule "D," when it should have been specified on Schedule "A," and the preperty being in the open and visible use and occupation of the company for railway purposes, the mistake must have been palpable to the local assessor, and he must have known it was property which he had no authority to assess—the company was not estopped by his schedules from saying that the property in question was railroad track.

Even if there was a discrepancy in the return as to the number of acres constituting the right of way, all the right of way was intended to be embraced within the return made; and if the correct number of acres was not stated, that would not justify the local assessor in assessing any portion of the right of way.

Appeal in chancery from a decree of the circuit court of Coles county, in a suit brought by a railroad company to restrain the collection of a tax. Reversed in part.

The facts are stated in the opinion.

Stevens, Lee & Horton and *Wiley & Neal* for appellant.

S. M. Leitch for appellee.

Sheldon, J.—This was a bill in chancery filed by the Peoria, Decatur & Evansville R. Co. on May 22, 1882, for the purpose of restraining the collection of a tax assessed against the company upon assessment made by the local assessor of Mattoon township, upon certain lots and blocks and the buildings and improvements on them in the city of Mattoon. Facts.

The bill avers that on and prior to May 1, 1881, all of said lots and blocks were occupied by the railway company, with its shops, depot and other buildings, with a large number of railroad tracks, and used exclusively for railway purposes: and that as such they were all embraced in the return of tracks, side tracks, railroad right of way, and improvements thereon, made by complainant, as required by law, to the state board of equalization, and were by

it assessed according to law; that the assessment by said board for the year 1881 against complainant's property in Coles county, including all the property above described, except the buildings, was $45,500, and upon the buildings described, including the shops and all machinery therein, was $10,800, the taxes upon which assessments have been paid by complainant; that the machinery assessed was stationary, fixed machinery, and included a stationary boiler and engine. The bill further avers that the local assessor, without right or authority, assessed the property, on which a tax was levied against the company, upon the lots and improvements before described, of $1,579.61; and upon the fixed machinery in said shops, including the said engine and boiler, was assessed a tax of $696.09,—making in the aggregate a tax on the local assessment against complainant of $2,275.70. This last is the tax the collection of which is sought to be enjoined. On hearing, the circuit court dismissed the bill, and this appeal was taken.

Section 42 of the revenue law (Rev. Stat. 1874, p. 865), in respect to railroad property, provides: "Such right of way, including the superstructures of main, side or second track and turnouts, and the station and improvements of the railroad company on such right of way, shall be held to be real estate for the purposes of taxation, and denominated 'railroad track,' and shall be so listed and valued." By section 50, the property denominated "railroad track" is required to be assessed by the state board of equalization.

In Chicago & A. R. Co. *v.* People, 98 Ill. 350, it was decided that under the revenue law the exclusive power to assess railroad track and rolling-stock of railway is conferred upon the state board of equalization, and that an assessment of property used as railroad track by the local township assessor is void.

There is no doubt, from the proof, that the property upon which this assessment by the local assessor was made was of the class denominated "railroad track," and alone assessable by the state board of equalization, and that it was assessed by such board and the tax under that assessment paid, so that the assessment by the local assessor was null and void.

But it is claimed that the appellant is estopped, by its schedules filed with the auditor of public accounts and the county clerk, from saying that the property in question was railroad track. It does appear by "schedule D," filed by the company, that the lots and blocks in question are real estate rather than railroad track.

ESTOPPEL.

Upon this point the testimony of the witness Bradbury, by whom, as general manager of the company, the schedules are signed, is as follows: "All of the property specified on schedule D sheets, except lots in block 143 in Noyes' Addition, was used for right of way purposes alone, for tracks, depot, and shops, as

the general yards of the company,—for the general purposes of the railway company as their right of way, and for no other purpose. All of the property listed on schedule D, except the lots in 143, were specified on said sheets D by an error, and should have been specified on "Schedule A," denominated railroad track. Block 143 is not involved here. The property being thus in the open and visible use and occupation of the railway company for the above purposes, the mistake must have been palpable to the assessor; he must have known the lots to be "railroad track," and property which he had no authority to assess. No injurious result in any respect has followed from the error in the schedule, more than the slight trouble caused the local assessor in making the assessment, which he had no authority to make, and must have so known. We do not think there is any foundation here for the application of the doctrine of estoppel as claimed.

In People *v.* Atkinson, 103 Ill. 45, referred to by appellee's counsel, where an assessment by the assessor of the township in which the taxpayer resided, instead of, as required by law, by the assessor of another township in which the property was situated, was sustained, the assessor had the power to assess that species of property; but here the local assessor had no authority to assess this kind of property.

Some point is made upon the number of acres embraced in their right of way as returned by the company in their schedules, it being called 94.50 acres, when a calculation of appellee's counsel, founded on the length and average width of the right of way, makes it to be 130 acres. All the right of way of the company was intended to be embraced within the return made; and if the correct number of acres was not stated, that would not justify the local assessor in assessing any portion of the right of way.

With respect to the boiler and engine, their assessment as personal property by the local assessor is admitted by appellant's counsel to have been proper under the decision in Johnson *v.* Roberts, 102 Ill. 655, and section 25 of the Revenue Law, requiring assessors to assess personal property, "every steam engine, including boilers." The fixed and stationary machinery attached to the shops we regard as constituting a part of the machine shops, and as embraced in the return made to the auditor, of machine shops situated on the right of way, and in the assessment of machine shops, made by the state board of equalization, and as not assessable by the local assessor. The assessment having been made by a person who had no authority by law to make it, and therefore void, the bill should have been sustained. Allwood *v.* Cowen, 111 Ill. 481; Searing *v.* Heavysides, 106 Ill. 85; Kimball *v.* Merchants' Savings, L. & T. Co., 89 Ill. 611; Anderson *v.* Chicago, B. & Q. R. Co., 4 West. Rep. 157

The decree will be reversed, except as to the engine and boiler,

and the cause remanded for further proceedings in conformity with this opinion.

Decree reversed in part.

Taxation—Improvements of Railroad Company on Right of Way held to be Real Estate.—Chicago, R. I. & P. R. Co. *v.* People, 4 Bradw. 468; Chicago & A. R. Co. *v.* People, 98 Ill. 350; Chicago & A. R. Co. *v.* People, 99 Ill. 464; Ohio & M. R. Co. *v.* Weber, 96 Ill. 443; Chicago & N. W. R. Co. *v.* Miller, 72 Ill. 141.

Taxation—All Buildings, etc., on Right of Way are Assessable by State Board only.—Chicago & Alt. R. Co. *v.* People, 99 Ill. 464; Ohio & M. R. Co. *v.* Weber, 96 Ill. 443; C. & N. W. R. Co. *v.* Miller, 72 Ill. 141; C., R. I. & Pac. R. Co. *v.* People, 4 Bradw. 468; C., B. & Q. R. Co. *v.* Siders, 88 Ill. 320.

Taxation—Of Track—Fraud.—State *v.* Yard, 11 Am. & Eng. R. R. Cas. 529; County of Santa Clara *v.* Southern Pac. R. Co., 13 Am. & Eng. R. R. Cas. 182; San Francisco, etc., R. Co. *v.* State Board, 13 Am. & Eng. R. R. Cas. 248; Cent. Pac. R. Co. *v.* State Board, 13 Am. & Eng. R. R. Cas. 256; Wabash, etc., R. Co. *v.* Johnson, 17 Am. & Eng. R. R. Cas. 487; Spencer *v.* People, 68 Ill. 513; Porter *v.* Rockford, R. & St. L. R. Co., 76 Ill. 561.

THE STATE *ex rel.* PULLMAN PALACE CAR CO., Appellant,

v.

ST. LOUIS COUNTY.

A railroad company in this State cannot be taxed under the Act of 1871 (Laws 1871, p. 56), upon the cars of the Pullman Palace Car Co., leased and operated by it.

APPEAL from St. Louis court of appeals. Affirmed.

Hitchcock, Madill & Finkelnburg for appellant.

Leverett Bell for respondent.

HENRY, C.J.—"The only question which arises upon this record is whether, under the act of March 10, 1871, relating to the taxation of railroad property, the cars of the Pullman Palace Car Co., which were leased by such company to certain railroads in this State, and operated by such railroads as a part of their rolling stock, were taxable as the property of such railroads; or whether, under the general revenue law, then in force, such property might lawfully be assessed for taxation by the assessor of St. Louis county, in which the Pullman Palace Car Co. had its chief office for the State of Missouri, as personal property." The above is the statement made by the court of appeals of the question arising upon this record, and we accept it as a correct

QUESTION.

statement. This court held that the cars of the Pullman Palace Car Co. did not belong to the railroad companies which had leased them and were, therefore, not taxable, under the act of March 10, 1871, as the property of such railroad.

Section one of that act provides, that all railroads in this State, "and all other property, real, personal, or mixed, owned by any railroad company, or corporation in this State," shall be assessed and taxed in the mode prescribed by that act, and that mode is different from that prescribed for assessing and taxing other railroad property. The solution of the question depends upon the meaning of the word "owned," as employed in that section. Section 6662, Revised Statutes, 1879, article 1 of the general revenue law, provides that: "All personal property of whatsoever nature and character, situate in a county other than the one in which the owner resides, shall be assessed in the county where the owner resides, and the owner, in listing it, shall specifically state in what county it is situated." And section 6 of the general revenue law, Wagner's Statutes, p. 1159, reads as follows: "All property, personal by the laws of this State, situate in a county other than the one in which the owner resides, shall be assessed in the county where such owner resides." The same was substantially the provision contained in the Revised Statutes of 1855, section 20, p. 1329; and the oath required of the taxpayer to his list was the same in all the revisions, viz., "that it contained a true list of all the personal property owned by him, made taxable by law."

It would not be seriously contended that, under those provisions of the law, one who had hired a yoke of oxen, or a horse belonging to a neighbor, would be required to include such property in his taxable list. In such case, the owner of the property, in the strict sense of the term, would have been required to include it in his list. Is the word "owned" to bear a different meaning, because it occurs in an act relating to the taxation of railroad property. If so, why? A very plausible and forcible argument is made in the brief of counsel for appellant, based upon the supposed case of a railroad company owning no cars, but equipping its road by hiring cars from other companies. The difficulty which would be encountered in the attempt to levy and collect taxes in the supposed case, giving the statute the strict construction placed upon it by the court of appeals, would, it is contended, practically defeat the purpose for which the act was passed. This might have been so, under the act of March 10, 1871, and this difficulty might still be encountered, with respect to other cars than Pullman Palace cars, but, by the act of March 24, 1873, all railroad companies are required to return for taxation "all Pullman Palace cars owned, run, hired, or leased by them." With regard to freight and passenger cars,

CONSTRUCTION OF STATUTE.

other than Pullman, I do not see how they can, under either the act of 1871 or that of 1873, be taxed as the property of a railroad company hiring or renting them. The passage of the act of 1873, so far from supporting the construction of the act of 1871, contended for by appellant's counsel, seems to me to sustain that given it by the court of appeals. If the proper construction is that contended for by counsel, there was no necessity for the passage of the act of 1873. It is not a legislative construction of the former act, but one on the same subject with a wider scope.

All concurring, the judgment is affirmed.

PULLMAN PALACE CAR CO.

v.

STATE OF TEXAS.

(64 *Texas*, 274.)

Construing that portion of the act of March 24, 1881 (Gen. Laws, p. 85), which undertakes to impose on "every firm, person or association of persons, owning or running any palace, sleeping or dining-room cars not owned by the railroad company in this State," an annual tax of $2 per mile, etc.; *held:*

(1) The tax contemplated is not a tax on property, which under the constitution must be taxed in proportion to value; nor is it a tax on persons, which must be uniform on the same class of subjects, to be legal.

(2) It is an occupation tax.

(3) By its terms the act applies to three classes of persons—viz. 1st, to the owner of the car who runs it, or permits it to be run, on a railway; 2d, to others, not the owners of the railway or cars, who run them; 3d, to railway companies or others, who run such cars on their own roads, and as to whom the law imposes no tax.

(4) The subject of an occupation tax is the thing or business done; and, so far as regards the business of running a Pullman sleeping car, it is the same whether the car be run by the owners of the railway, and belongs to them. or be run and owned by those who have no interest in the railway. It results, that a tax imposed on one running a sleeping car over the railway of another, when the same law exempts from tax the act of running the same description of cars over the road of the car owner, is not a tax equal and uniform, but is violative of the constitution, and cannot be collected.

(5) The fact that the railway company which owns and runs its own sleeping cars, over its own road, pays an *ad valorem* tax, cannot affect the question.

(6) Nor can the constitutional requirement in reference to occupation taxes be evaded by the fact that one pursuing the occupation pays an income tax. Neither can it be evaded on account of the fact that an occupation tax is paid by the party on a business kindred to that for pursuing which the occupation tax is claimed. Citing Kelly *v.* Dwyer, 7 Lea (Tenn.), 180; Burch

v. the Mayor, 42 Ga. 596; Hirsh v. Commmonwealth, 21 Gratt. 785, and other cases noted in the opinion.

An occupation tax which is not equal and uniform, but which exempts one class of persons pursuing an occupation, and imposes a tax on others pursuing the same occupation, is unconstitutional, void, and can be enforced against neither class of persons.

APPEAL from Bexar. Trial below before the Hon. G. H. NOONAN.

Mason & Carr for appellant.

J. H. McLeary and *John D. Templeton* for the State.

STAYTON, ASSOCIATE JUSTICE.—The general nature and result of this action is thus correctly stated by counsel:

"This suit is brought by the State of Texas, by its attorney general, charging that the appellant is pursuing the occupation of owning and running, on railroads in Texas, palace, sleeping, and dining-room cars; that on and after the 24th day of March, 1881, appellant, for the privilege of pursuing said occupation, became liable and indebted to appellee in the sum of $2 for each mile of railroad in the State of Texas over which appellant's said cars run, as an annual occupation tax—said cars not being owned by any of the railroad companies who own the railroads, claiming in the aggregate $5,000. NATURE OF ACTION.

Defendant pleaded general and special demurrer, general denial, unconstitutionality of the law authorizing the collection of the tax sued for, and repeal of the law before the collection of the tax, and that defendant's cars were interstate and not liable to occupation tax.

The cause was submitted to the district judge without jury. The trial resulted in a judgment for plaintiff in the sum of $4,302.

There are many assignments of error, some of which do not properly arise upon the record before us, and many of the others refer to matters not deemed important or necessary to be considered.

The first essential inquiry which arises is: Is the act under which the tax is claimed invalid, in so far as it affects the question involved in this case. QUESTION.

The tax in question is claimed under that part of the act of March 24, 1881, which is as follows:

"From every person, firm or association of persons owning or running any palace, sleeping, or dining-room cars not owned by the railway company, on any railroad in this State, there shall be collected an annual tax of $2 per mile for each and every mile of any and all railroads in this State over which such cars may run. The tax herein due shall be paid by said person, firm, or association of persons, to the comptroller of public accounts, whose receipt under seal shall be issued to the company, person, or firm, certified copies of which shall be evidence of the payment of state tax; *provided*, that nothing herein contained shall authorize the levy of any county

or municipal tax upon such person, firm, or association of persons." Gen. Laws 1881, p. 58.

ACT CONSTRUED.

The tax contemplated by this part of the act is not a tax upon property, which, under the constitution, must be taxed in proportion to its value; nor is it a tax upon persons, which must be uniform. It is a tax imposed on a named business which may be carried on by natural persons or by corporations within this State on property belonging to others; and such as is designated in the constitution an "occupation tax."

The act applies to three classes of natural persons and corporations, distinguished by their different degrees of ownership or relationship to the entire property with which the business is conducted.

1st. It applies to the owners of such cars as are named, who run them, or permit them to be run, on railways within this State not belonging to the owners of such cars.

2d. It applies to such persons or corporations as do not have the full ownership of such cars, who, with right or without right to use them as against the owners, do run them on railways within this State, such persons not being the owners of the railway on which they are run.

Upon these two classes the tax is imposed.

3d. It applies to persons or corporations who own or run such cars on railways belonging to themselves, and upon such imposes no tax whatever on the business.

The pursuit of the business, with the cars described, constitutes the occupation taxed, and the ownership is not made an element by which the amount of the tax is determined; for the tax imposed on the owner of such cars who runs them is no more nor less than the tax imposed on one who runs such cars not being their owner.

The first and second class referred to are evidently embraced for the purpose of including all who pursue business with such cars, except the third class, which is not subjected to the burden imposed on the others.

The tax authorized by the act is essentially an occupation tax, in which the ownership of the cars is of no importance, except as it may fix the person on whom the liability is imposed.

The constitution declares that "all occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax." Const., art 8., sec. 5.

Under the act a railway company is not made liable for the tax if it uses on its own road its own or the cars of others, in every respect the same as those named in the act, and used in the same way and business, with like charges for the use of such cars, in addition to the ordinary and lawful charges for carriage, as are made by

persons or corporations owning or running such cars on railways not their own.

The inquiry arises whether a law which thus imposes a tax on others than railway companies, for the pursuit of this business, while it exempts railway companies therefrom, does not violate the provisions of the constitution referred to.

That the tax contemplated by the act is an occupation tax is too clear for discussion.

Does the business done by persons or corporations owning such cars and running them on the roads of others, or the business done by persons not owning but running such cars on the roads of others, and business done by railway companies on their own roads with such cars, embrace the same class of subjects of taxation?

OCCUPATION TAX AS TO RAILROAD.

The subject of taxation is the thing or business done; the occupation followed for and on account of which the tax is imposed on persons and corporations that pursue it.

The business or occupation of the owners of such cars running them on the roads of others, and of those who are not owners but run such cars on the roads of others, in so far as the particular occupation for which the tax is imposed is concerned, in no essential differs from that pursued by a railway company that runs its own cars of the same kind for the same purpose over its own road. The same acts and facts make the occupation in either case, and it looks to the same end and purpose.

The business or occupation of the one is conducted by the same means as the other, leads to the same results to the persons conducting it and to the persons accommodated by it.

The business or occupation taxed under the act in question is certainly nothing more than the running of cars of a certain kind on railways for the purposes for which such cars are ordinarily used. This is the business or occupation of a railway company, in so far as it runs its own cars of the same kind on its own road for the same purposes, making a charge for the use of such cars other than is made for the ordinary transportation of passengers, on account of the increased comfort and convenience to passengers afforded by the use of such cars. A business or occupation separate and apart from its ordinary business of transporting passengers; and on this ground only can be defended the demand or receipt of any sum whatever in excess of the rate fixed by law for the transportation of passengers.

That a railway company may pursue another business or occupation than that taxed by the law in question cannot affect the question whether a business which it does pursue is the subject of taxation for the pursuit of which others are taxed; nor can the fact that it owns other property, without which the occupation in a given case could not be pursued, affect the question.

Do railway companies who run cars of the kinds named in the statute on their own roads pursue the same class of occupation as those who own or run cars of the same kind on the railways of others?

There are many classes of occupations subjected to taxation by the laws of this State.

OCCUPATION TAXES GENERALLY.

Many of these classes, however, are distinguished by the fact that the occupations themselves are entirely different and distinct in character, and in reference to such no question of classification can arise.

There are, however, some occupations taxed which are very kindred in the elements which make them up, i.e., the acts and things which constitute the occupation taxed.

The person who sells liquors of given kinds in quantities less than a quart is held to follow an occupation separate and distinct from that followed by a person who sells the same kind of liquors in quantities of a quart and more, and upon each of those occupations a tax is imposed, but they differ in amount.

Here the facts which constitute the occupation are in part the same, but not entirely so; and hence are held to belong to different classes of occupations and not required to pay the same amount of tax.

Merchants are taxed on their occupations, but are classed in accordance with the amount of business presumed to be done by them, evidenced by the extent of their annual purchases; but while the occupation of any of these classes involves the acts of buying and selling, the extent of the former act determines the class to which the merchant belongs.

Bankers, money brokers, operators of photograph or other like galleries, auctioneers, cotton brokers and factors, stock and bill brokers, and some others, are compelled to pay an occupation tax, and for this purpose are classed in accordance with the population of the place in which they do business. In all those cases, place, connected with and determined by population, in which the business is carried on is an element in the determination of the class of occupation to which each one belongs.

In all these classes of cases an intention is manifested to make taxation as near equal and uniform as, in the nature of things, it can be done, and, with a view to this end, the classification made to depend upon the existence of some act or fact necessary to the one class but not to the other; the taxes being uniformly higher or lower as the acts on which the classification is made to depend render it probable that the taxpayer, from the given business, derives greater or less profit.

There is no act or fact entering into the occupation of running such cars as are mentioned in the statute, over the road of another, which does not enter into the occupation of the road owner who

runs over his own road the same kind of cars for the same uses and purposes, from which the road owner can be withdrawn from the class on which the statute imposes the tax.

If the things done constitute in one person or corporation the taxed occupation, no one doing the same things can be omitted from the class taxed, without a violation of the constitutional provision; even though the omitted or excepted person or corporation may do more or other things than are necessary to constitute the taxed occupation, and though that done in excess may, within itself, constitute a distinct occupation subject to taxation, however kindred in nature the occupations may be.

The legislature may classify subjects of taxation, and these classifications may, as they will, be more or less arbitrary; but when the classification is made all must be subjected to the payment of the tax imposed, who, by the existence of the facts on which the classification is based, fall within it, unless exempted under some other constitutional provision.

The fact that a railway company owns the railway over which it runs its own, or the cars of some other person, cannot affect the question of classification; for such ownership is not one of the elements on which others are placed within the class.

A classification which would impose such a tax on the merchant, banker, auctioneer, dentist, lawyer, or other person who does not own the house in which he pursues his occupation, while it does not subject to such taxation persons following the same occupations in houses owned by them, would at once be declared an infraction of the constitution, which declares that "all occupation taxes shall be equal and uniform upon the same class of subjects."

The fact that persons and corporations not made subject to the tax pay *ad valorem* tax on the property which they use in connection with the occupation which they pursue cannot affect the question; for such tax is required of all property-owners, and from it they cannot escape because they pay an occupation tax on the business in which such property is used. Davis *v.* The Mayor, 64 Ga. 133; Johnston *v.* The Mayor, 62 Ga. 650; Kelly *v.* Dwyer, 7 Lea (Tenn.), 180.

The owners of cars made subject to the occupation tax are also subject to an *ad valorem* tax if they be residents of the State, or the property so situated as to make it subject to taxation within the State.

Nor can the constitutional requirement in reference to occupation taxes be evaded, or its application rendered unnecessary, by the fact that the person or the corporation pursuing the occupation pays an income tax; nor by the fact that an occupation tax is paid upon a business kindred to that on account of which the given occupation tax is claimed. Kelly *v.* Dwyer, 7 Lea, 180; Burch *v.* The Mayor, 42 Ga. 596; Hirsh *v.* Commonwealth, 21 Gratt. 785;

Woolman *v.* The State, 2 Swan (Tenn.), 353; The State *v.* Stephens, 4 Tex. 139.

It is suggested, if the statute is violative of the constitutional provision referred to, that it should not be held void in so far as it imposes the tax, but that those who by its terms are exempted from its operation should be held subject to its provisions.

The legislature alone can impose taxes, and determine what occupations shall be taxed; and when it imposes an occupation tax and expressly declares that given persons or corporations shall not be subjected to it, the courts have no power to declare that they shall; but they have the power to declare that the act by which such a discrimination is made is inoperative upon those upon whom the burden is attempted to be imposed, because violative of the rule requiring equality and uniformity. The legislature has changed the statute so as to make the tax upon the particular occupation operate upon all engaged in it, thus recognizing the invalidity of the act under which the tax in this case is attempted to be collected. It is unnecessary to consider the other questions presented.

The judgment of the court below will be reversed and the cause dismissed.

Reversed and dismissed.

License and Privilege Taxes.—Central Pac. R. Co. *v.* State Board, 13 Am. & Eng. R. R. Cas. 256; State *v.* Me. Cent. R. Co., 13 Id. 283; Memphis, etc., R. Co. *v.* Tennessee, 13 Id. 423; Pullman S. C. Co. *v.* Nolan, 17 Am. & Eng. R. R. Cas. 398.

Chicago, Burlington and Kansas City R.

v.

Guffey.

(120 *United States*, 569.)

The provision in the state constitution of Missouri of 1865, that "no property, real or personal, shall be exempt from taxation, except such as may be used exclusively for public schools, and such as may belong to the United States, to this State, to counties, or to municipal corporations within the State," applies to stock issued for constructing branches of the St. Joseph & Iowa R. in that State under the provisions of the statute of March 21, 1867, "to aid in the building of branch railroads in the State of Missouri;" and the provision in the charter of that railroad company, enacted in 1857, that its stock should be exempt from taxation for state and county purposes, does not apply to the stock issued for branches constructed under the act of 1868.

Immunity from taxation by the State will not be recognized, unless granted in terms too plain to be mistaken.

ERROR to the supreme court of the State of Missouri.

This action was instituted in conformity with a local statute of Missouri, to recover certain state and county taxes alleged to be due upon the property of the plaintiff in error, situate in Putnam county in that State. The federal question is stated in the opinion of the court.

Jeff. Chandler for plaintiff in error. *L. T. Hatfield* and *A. W. Mullins* were with him on the brief.

John P. Butler for defendant in error. *B. G. Boone*, attorney-general of Missouri, and *S. P. Huston* filed a brief for same.

HARLAN, J.—The judgment which this writ of error brings up for review affirms the liability to taxation, in Missouri, for state and county purposes, of what was formerly known as the Central North Missouri Branch of the St. Joseph & Iowa R., FACTS. more recently named the Linneus Branch of the Burlington and Southwestern R. Co., and now owned by the Chicago, Burlington, & Kansas City R. Co., a corporation organized under the laws of Missouri. The latter company claims to have succeeded to all the rights, privileges, and immunities granted to the St. Joseph & Iowa R. Co. in its charter of 1857, among which was an exemption of its stock from taxation for "state and county" purposes. As the construction which the supreme court of Missouri places upon certain legislation, enacted after the charter of the St. Joseph & Iowa R. Co. was granted, is inconsistent with the exemption claimed, the controlling question, on this writ of error, is whether the local statutes, as interpreted and applied by that court, impair the obligation of any contract which the company had with the State and thereby deprive its successor, the plaintiff in error, of any rights secured by the constitution of the United States.

That question mainly depends upon the construction of an act of the general assembly of Missouri, entitled "An act to aid in the building of branch railroads in the State of Missouri," approved March 21, 1868.

That act took effect from its passage, and is as follows:

"Section 1. Any railroad company in this State authorized by law to build branches, and wishing to avail themselves of the provisions of this act, shall, by its board of directors, pass, and cause to be entered upon its records, a resolution setting forth such desire, and designating the name under which such branch shall be built, its point of intersection with its main line and general course, a certified copy of which resolution shall be filed with the secretary of state, after which they shall be governed by the provisions of this act.

"Sec. 2. Whenever any such railroad company shall undertake the construction of a branch designated as provided in the first section of this act, they shall receive donations or subscriptions to

stock to aid its construction in the name of such branch, which shall be expressed in the certificate of stock issued; the cost and expenses of constructing and operating such branch shall be kept separate and distinct from expenses on the main line. They may borrow money and issue bonds secured by mortgage on such branch road to aid in its construction, and, in general, may operate, lease, sell, or consolidate with any connecting road, distinct and separate from their main line, and in any other way may manage or dispose of such branch, as by law they may be authorized with reference to their main line, and separate therefrom.

"Sec. 3. Any branch road so constructed shall not be holden for any debt, lien, or liability of the main line, nor shall the main line be holden for any debt, lien, or liability of such branch. Any dividends of profits arising out of the business of such branch road shall be divided among the stockholders in said branch, and in all respects the interest of the stockholders in the branch shall be kept separate and distinct from the interests of the stockholders in the main line.

"Sec. 4. The holders of stock in any railroad company which was subscribed in aid of the construction of a branch road, according to the provisions of this act, shall have the same rights as other stockholders in the company in the choice of officers; but in all matters directly and specially affecting the interests of such branch road, the stockholders in such branch shall control, and, for such purpose, the directors, under their by-laws, may, or on the petition of parties representing one tenth of such stock shall, call a meeting of the stockholders in such branch, setting forth the object of such meeting; and at any such meeting such stockholders may instruct the board of directors in all matters relating especially to their interests, and they shall be governed by such instructions, if not inconsistent with the laws of the State and the powers of such company." Laws Missouri, 1868, p. 90.

The branch road in question was constructed under the provisions of that statute. That fact distinctly appears from the preamble and resolutions adopted by the board of directors of the St. Joseph & Iowa R. Co., March 25, 1871 (a certified copy thereof being filed April 19, 1871, in the office of the secretary of state of Missouri), and expressly stating the purpose of the company to avail itself of the provisions of the act of 1868 in building this branch road.

The statute, it will be observed, does not exempt from taxation stock subscribed in aid of the construction of the branch roads for which it makes provision. But as it applies to railroads companies, "authorized by law to build branches," and as the St. Joseph & Iowa R. Co. was authorized by its charter of 1857 to build such branch roads as it deemed proper.—State *ex rel.*, etc., *v.* County Court of Sullivan County, 51 Mo.,

EXEMPTION FROM TAXATION.

522, 531—it is contended that the exemption, by the company's original charter, of its stock from taxation for state and county purposes, extends to stock subscribed in the name and exclusively for the benefit of the branch road constructed under the act of 1868.

When that statute was passed, the constitution of Missouri of 1865 declared that "no property, real or personal, shall be exempt from taxation, except such as may be used exclusively for public schools, and such as may belong to the United States, to this State, to counties, or to municipal corporations within this State." Art. 12, § 16.

As, perhaps, every railroad company, organized under the laws of the State prior to the adoption of the constitution of 1865, had general authority to construct branch roads, it is clear that the construction of the act of 1868, for which the appellant contends, cannot be accepted, except upon the theory that the legislature intended to evade the constitutional inhibition upon exemptions of property from taxation; for it is plain, from the provisions of the act of 1868, that the roads which it authorized to be built, although called branch roads, are, for all purposes of separate ownership and management, independent lines, quite as distinct from the main lines as if constructed and operated by other and different corporations. Such provisions as are to be found in that statute are rarely ever found in legislative enactments. An analysis of them shows that any "branch" road constructed under it must be designated by the name under which it is built; donations and subscriptions in aid of it must be received in that name; the cost of construction and management must be kept separate and distinct from expenses incurred on the main line; money may be borrowed and bonds issued secured by mortgage on the branch only; the branch road may be sold, operated, leased, or consolidated with any connecting road of another corporation, or disposed of separately from the main line; it is liable only for its own debts, and not for those of the main line; profits arising out of the business of such branch road can be divided only among its stockholders, and their interests are to be kept distinct from those of the stockholders of the main line; and the board of directors of the company owning the main line are required, in all matters relating especially to the interests of the stockholders of the branch road, to follow all instructions given by the latter, without regard to their effect upon the main line. In other words, the stockholders of a branch road constructed under the act of 1868 constitute, in effect, a separate organization, having no connection whatever with the stockholders of the main line, except that the main line and the branch road are, for purposes of convenience, managed by the same board of directors. It may be conceded, for all the purposes of this case, that if the St. Joseph & Iowa R. Co., or the company

which succeeded to its rights, privileges, and immunities, had built a branch road under the charter of 1857, it could, in respect to that branch, have stood upon the exemption contained in its charter. Any stock issued by it, and sold to aid in the construction of such a branch road, would, in that case, have been on the same footing in all respects as other stock it may have issued; and its main and branch lines would have been parts of the same system, controlled by the board of directors as they deemed proper. But the company elected not to adopt that course, for the reason, perhaps, that it could not, in that mode, have raised the money necessary to build a branch road. In the condition in which all the railroads of Missouri were left by the civil war, it would have been difficult to raise money to build branch roads, if their future was to be endangered by connection with main lines which needed repairs, and the corporations owning which were without credit. It was, doubtless, for that reason that the St. Joseph & Iowa R. Co., instead of constructing a branch road under the charter of 1857, determined to avail itself of the provisions of the statute of 1868, which permitted it to construct and maintain what is called a branch road, but what, in fact, would be a road having only nominal connection with the main line of the company.

The branch roads to which the charter of the St. Joseph & Iowa R. Co. referred were, in our judgment, such as would be subject to the same control and management as its main line, and not roads that were branch roads only in name, but were distinct lines, operated solely with reference to the interests and pursuant to the directions of those holding stock therein, irrespective of the necessities of the main line.

To avoid the conclusion that there was a purpose to devise a plan whereby railroad property should be exempt from taxation, which the constitution of 1865 intended should be taxed, we must assume that the legislature intended to invite railroad corporations having general power under their charters to construct branch roads, to waive the exercise of such power, and construct roads under the provisions of the act of 1868, which, although not granting an immunity from taxation, yet afforded peculiar protection to those whose money might be used in such construction.

To say the least, it is not clear that the legislature intended that the exemption from taxation, given by such charters as that granted to the St. Joseph & Iowa R. Co., should be extended to branch roads constructed under the act of 1868. As that statute does not grant immunity from taxation to roads constructed under its provisions, and as the system established by it is complete in itself without reference to other legislative enactments, the present claim to exemption must be denied; for it is the settled doctrine of this court that an immunity from taxation by the State will not be recognized unless granted in terms too plain to be mistaken.

AUTHORITIES.

Providence Bank *v.* Billings, 4 Pet. 514; Philadelphia, Wilmington & Baltimore R. *v.* Maryland, 10 How. 376; Memphis & Little Rock R. *v.* Commissioners, 112 U. S. 609, 617; Southwestern R. *v.* Wright, 116 U. S. 231, 236; Vicksburg, etc., R. *v.* Dennis, 116 U. S. 665, 667.

As our conclusion upon this point accords with that of the state court, and is sufficient to dispose of the whole case, we omit any consideration of other questions presented in argument.

Judgment affirmed.

TENNESSEE

v.

WHITWORTH.

(117 *United States*, 129.)

A state statute incorporating a railroad company, which provides that the capital stock of the company shall be forever exempt from taxation, and that the road with all its fixtures and appurtenances shall be exempt from taxation for the period of twenty years and no longer, exempts the road, its fixtures and appurtenances from taxation only for the term named in the act; but forever exempts shares in the capital stock of the company, in the hands of the various holders, from taxation in the State.

When two railroad corporations, whose shares are by a state statute exempt from taxation in the State, consolidate themselves into a new company under a state law which makes no provision to the contrary, and issue shares in the new company in exchange for shares in the old company, the right of exemption from taxation in the State passes into the new shares and into each of them.

ERROR to the circuit court of the United States for the middle district of Tennessee.

This was a suit in mandamus brought by the State of Tennessee, in the circuit court of Davidson county, against George W. Whitworth, the trustee and tax collector of that county, to require him to assess for taxation the shares of stock in the Nashville, Chattanooga & St. Louis R. Co. After the suit had been begun in the state court it was removed by Whitworth to the circuit court of the United States for the middle district of Tennessee, under the act of March 3, 1875, ch. 137, 18 Stat. 470, on the ground that the suit was one arising under the constitution of the United States.

The case was as follows: The Nashville & Chattanooga R. Co.,

now, by consolidation with the Nashville & Northwestern R. Co. and a change of name, the Nashville, Chattanooga & St. Louis R. Co., was incorporated by the legislature of Tennessee, December 11, 1845, to build and operate a railroad. Sec. 38 of its charter was in these words:

"Sec. 38. The capital stock of said company shall be forever exempt from taxation, and the road with all its fixtures and appurtenances, including workshops, warehouses, and vehicles of transportation, shall be exempt from taxation for the period of twenty years from the completion of the road, and no longer."

The act incorporating the Nashville & Northwestern R. Co. contained a provision identical with this.

The question was whether this provision had the effect of a contract by the State for the exemption from taxation in Tennessee of the shares of the capital stock of the corporation. The capital stock was by the charter divided into shares of $25 each, to be subscribed for on books opened for that purpose. It was also provided that, as soon as the requisite number of shares had been subscribed, "the Nashville & Chattanooga R. Co. shall be regarded as formed," and "the said subscribers to the stock shall form a body politic and corporate in deed and in law by the name and for the purpose" specified. Fifty cents on each share was to be paid in money at the time of subscribing.

Sections 9, 12, 15, 16, and 17 were as follows:

"Sec. 9. As soon as the number of forty thousand shares shall have been subscribed, it shall be the duty of the commissioners appointed to declare the same, to appoint a time for the stockholders to meet in Nashville, and give notice thereof by publication in some of the newspapers of Nashville, at which time and place the said stockholders, in person or by proxy, shall proceed to elect the directors of the company, and to enact all such regulations, rules, and by-laws as may be necessary for the government of the corporation and the transaction of its business. The persons elected directors at this meeting shall serve for such period, not exceeding one year, as the stockholders may direct; and at this meeting the stockholders shall fix on the day and place or places where the subsequent elections of directors shall be held; and such elections shall thenceforth be annually made. But if the day of annual election should pass without any election of directors, the corporation shall not be thereby dissolved, but it shall be lawful on any other day to hold and make such election in such manner as may be prescribed by a by-law of the corporation."

"Sec. 12. The board of directors shall not exceed, in their contracts, the amount of the capital of the corporation, and of the funds which the company may have borrowed and placed at the disposal of the board; and in case they should do so, the president

and directors who may be present at the meeting at which such contract or contracts so exceeding the amount aforesaid shall be made, shall be jointly and severally liable for the excesses, both to the contractor or contractors and the corporation: *Provided*, that any one may discharge himself from such liability by voting against such contract or contracts, and causing such vote to be recorded on the minutes of the board, and giving notice thereof to the next general meeting of the stockholders."

"Sec. 15. The board of directors may call for the payment of twenty-four and a half dollars on each share of stock in sums not exceeding two dollars in every thirty days: *Provided*, that twenty days' notice be given of such call in at least one public newspaper of the State in which any of the stockholders may reside; and a failure to pay or secure to be paid, according to the rules of the company, any of the instalments so-called, as aforesaid, shall induce a forfeiture of the share or shares on which default shall be so made, and all payments thereon, and the same shall vest in and belong to the company, and may be restored to the owner or owners by the board of directors, if they deem proper, on the payment of all arrears on such shares, and legal interest thereon; or the directors may waive the forfeiture after thirty days' default, and sue the stockholders for the instalments due, at their discretion.

"Sec. 16. The stock of said company may be transferred in such manner and form as may be directed by the by-laws of the said corporation.

"Sec. 17. The said company may at any time increase its capital to a sum sufficient to complete the said road, and stock it with everything necessary to give it full operation and effect, either by opening books for new stock, or by selling such new stock, or by borrowing money on the credit of the company, and on the mortgage of its charter and works; and the manner in which the same shall be done in either case shall be prescribed by the stockholders at a general meeting; and any State or any citizen, corporation, or company of this or any other State or country, may subscribe for and hold stock in said company, with all the rights and subject to all the liabilities of any other stockholder."

On the 21st of January, 1848, but before the corporation was organized by the election of directors, the charter was amended as follows:

"Sec. 3. *Be it enacted*, That the charter of the company be further so amended that the said company be required to estimate and pay semi-annually to the several holders thereof a sum equal to six per cent per annum on the capital stock of said company actually paid in, to be charged to the cost of construction: *Provided* a majority of the stockholders at their first regular meeting agree thereto."

The circuit court was of opinion that the shares of stock were by the charter exempt from taxation, and gave judgment accordingly. To reverse that judgment this writ of error was brought.

Samuel Watson, *J. B. Heiskell*, and *James M. Head* for plaintiff in error.

Edward H. East for defendant in error.

WAITE, C.J.—It is apparent from the charter that the subscribers of shares and those claiming under them were to be the holders of the stock of the corporation, and that the money paid into the treasury upon subscriptions was to be used by the corporation in building and equipping its railroad. In this way the capital of the corporation was to be converted into the railroad and its appurtenances. A tax upon the railroad, therefore, after its completion, is necessarily a tax upon the capital, because, practically, the capital and that into which it has been converted are the same. The railroad of the corporation may be worth more than its capital, but all its capital is in its railroad. Such being the case, the taxation of both railroad and capital would be, so far as the corporation is concerned, double taxation.

TAXATION OF BOTH RAILROAD AND CAPITAL.

In Railroad Companies *v.* Gaines, 97 U. S. 697, it was held that a provision in the charter of the Memphis & Charleston R. Co., precisely like that now under consideration, did not exempt the railroad of that corporation and its appurtenances from taxation after twenty years from the time of its completion, even though the capital stock of the corporation had all been invested in the railroad, because, taking the whole section together, it was apparent such was not the intention of the legislature. The property was taxable, but the capital stock was exempt.

It is no doubt true that the legislature may make a difference, for the purposes of taxation, between the capital stock of a corporation in the hands of the corporation itself, and the shares of the same capital stock in the hands of the individual stockholders. That has often been done, and the cases are numerous where the exemption of shares from taxation has been claimed because of a charter exemption of the capital stock. Notably this was the case with the national banks. The capital stock of such banks invested in United States securities is not taxable by the States, but shares of the stock in the hands of the individual stockholders may be taxed without deduction on account of such an investment. This has been held from the beginning. Van Allen *v.* The Assessors, 3 Wall. 573; Bradley *v.* The People, 4 Wall. 459, 462; The People *v.* The Commissioners, 4 Wall. 244; Lionberger *v.* Rouse, 9 Wall. 468. The capital stock in the hands of the bank is exempt because invested in securities which are not to be taxed, Rev. Stat. § 3701, but the shares in the hands of the stockholders are, by the

very terms of the banking act, put, for the purposes of state taxation, on the same footing as other moneyed capital. Rev. Stat. § 5219. This, it was said, showed the intention of Congress to exempt the bank for what was invested in government securities, but to charge the stockholder. In Farrington *v.* Tennessee, 95 U. S. 679, the charter of the Union and Planters' Bank provided that "said company shall pay to the State an annual tax of one half of one per cent on each share of the capital stock subscribed, which shall be in lieu of all other taxes," and the question was, whether this exempted the shares in the hands of the stockholders from any further taxation by the State. The court, three justices dissenting, held that it did, because, as the charter tax was laid on each share subscribed, the further exemption must necessarily have been of the shares in the hands of the holders, although the tax as imposed was payable by the corporation. In all cases of this kind the question is as to the intent of the legislature, the presumption always being against any surrender of the taxing power.

TAXATION OF CORPORATIONS.

In corporations four elements of taxable value are sometimes found: 1, the franchises; 2, capital stock in the hands of the corporation; 3, corporate property; and 4, shares of the capital stock in the hands of the individual stockholders. Each of these is, under some circumstances, an appropriate subject of taxation; and it is no doubt within the power of a State, when not restrained by constitutional limitations, to assess taxes upon them in a way to subject the corporation or the stockholders to double taxation. Double taxation is, however, never to be presumed. Justice requires that the burdens of government shall as far as is practicable be laid equally on all, and if property is taxed once in one way, it would ordinarily be wrong to tax it again in another way, when the burden of both taxes falls on the same person. Sometimes tax laws have that effect; but if they do, it is because the legislature has unmistakably so enacted. All presumptions are against such an imposition.

EXEMPTION CONSIDERED.

This brings us to an examination of the present charter to see what the legislature has expressed its intention of doing. "The capital stock of said company" is exempt from taxation. That has been expressly enacted, and the owner or owners of the stock are necessarily relieved from all taxation on this account. The important question is, therefore, who are the owners of the capital stock of this corporation within the meaning of the term "capital stock" as used in this charter, because, in construing statutes which are binding on States as contracts, the words employed are, if possible, to be given the same meaning they had in the minds of the parties to the contract when the statute was enacted. In this respect there is no difference between a contract of a State and a contract of a natural person. If the words employed are capable of more than one meaning, that meaning is

to be given them which, taking the whole statute together, it is apparent the parties intended they should have.

Returning to the charter, we find that the "capital stock" is divided into shares. These shares are to be subscribed and paid for, and the money raised in this way constitutes the "capital" of the corporation spoken of in section 12, where it is said, "the board of directors shall not exceed in their contracts the amount of the capital of the corporation," etc., and in section 17, where it is provided "that saidcompany may at any time increase its capital to a sum sufficient to complete the said road." This capital is to be used by the corporation to build and equip its road, and if more capital is needed for that purpose it may be raised "by opening books for new stock, or by selling such new stock." The manner of doing this may "be prescribed by the stockholders at a general meeting; and any State, or any citizen, corporation, or company, . . . may subscribe for and hold stock in the said company, with all the rights, and subject to all the liabilities, of any other stockholder." Sec. 17. Payments of subscriptions are to be made on each share of stock, and if default is made in a payment when demanded "the share or shares on which default shall be so made and all payments thereon" are forfeited, "and the same shall vest in and belong to the company," but the board of directors may, if they deem proper, restore them to the "owner or owners," "on payment of all arrears on such shares and the legal interest thereon." Sec. 15. So, too, "The stock of said company may be transferred in such manner and form as may be directed by the by-laws of the corporation," sec. 16; and, under the amending act of 1848, interest was to be paid semi-annually at the rate of six per cent per annum "to the several holders thereof . . . on the capital stock of said company actually paid."

From this it is clear to us that while the money paid in by the subscribers of the shares of the capital stock of the corporation constituted the capital of the corporation which was to be used in building and equipping the railroad, the stock created by such subscription and payment was to belong to and remain as the property of the several holders of the shares so subscribed and paid for. As was shown in Railroad Companies *v.* Gaines, above cited, the words "capital stock of said company," and the words "the road with all its fixtures and appurtenances," were used in the charter to describe different things. The "capital," which upon the payment by the subscribers belonged to the corporation, has been converted into the railroad and its appurtenances, and it had no separate existence as a taxable thing after the road was built and equipped. But the "capital stock," divided into shares, subscribed and paid for by the persons to whom the shares were originally issued, still has, and was by the charter intended to have, an existence separate and distinct from the property into which the money paid for it has

been converted. It can now be bought, sold, and transferred. Its holders and owners are the owners of the corporation. They may meet and elect directors who are to manage its affairs. The profits of the corporation are to be divided among them, in proportion "to the stock each may hold," sec. 30, and upon the dissolution of the corporation they will be entitled to receive in like proportion the proceeds of what remains of the corporate property after all the corporation debts and liabilities are paid or satisfied. In effect the contributions of subscribers of the shares were stocked as the capital of the corporation. The aggregate of the subscriptions made the aggregate of the stock. Each subscriber owned that part of the stock which his shares represented, and the aggregate of the shares represented the aggregate of the stock. It was evidently called the "capital stock of the company," because it was the stock which, when subscribed and paid for, furnished the corporation with the capital to build its road. As capital it belonged to the corporation, but as stock it belonged to the several holders of the shares into which it was divided. The charter exempted the stock from taxation clearly, because the property which represented the stock had been put in its place as a taxable thing. The exemption is of the thing called the "capital stock," divided into shares. As the whole thing is exempt, so must necessarily be its several parts or shares.

It follows that the judgment of the circuit court was right, and it is consequently affirmed.

TENNESSEE

v.

WHITWORTH.

(117 *United States*, 139.)

The right to have shares in its capital stock exempt from taxation within the State is conferred upon a railroad corporation by state statutes granting to it "all the rights, powers and privileges," or granting it "all the powers and privileges," conferred upon another corporation named, if the latter corporation possesses by law such right of exemption: and there is nothing in the provision of art. xi., sec. 7, of the Tennessee constitution of 1834 to change this general rule when applied to a statute of that State.

A state statute enacted that a railroad company should "for its government be entitled to all the powers and privileges, and be subject to all the restrictions and liabilities, imposed" upon another railroad company: *Held*, that the words "for its government" implied for its regulation and control.

When two railroad corporations whose shares are by a state statute exempt

from taxation within the State, and a third company created under the laws of another State and whose road is in the latter State, consolidate into a new company, and issue shares in the new company in exchange for shares in the old company, the right of exemption from taxation in the first State passes into the new shares and into each of them, unless a law of the first State makes provision to the contrary.

ERROR to the circuit court of the United States for the Middle District of Tennessee.

This, like the case between the same parties just decided, *ante* 129, was a suit in mandamus brought by the State of Tennessee to require the trustee and tax collector of Davidson county to assess for taxation the shares of the capital stock of the railroad company, and the only question not already disposed of was, whether the Nashville & Decatur R. Co. had the same charter contract for the exemption of its capital stock from taxation as the Nashville & Chattanooga R. Co. The facts were these:

The Tennessee & Alabama R. Co. was incorporated by the legislature of Tennessee on the 23d of January, 1852, to build a railroad from Nashville, by the way of Franklin, to the line between Tennessee and Alabama in the direction of Florence, Ala. This company was granted by its charter "all the rights, powers and privileges," and subjected "to all the liabilities and restrictions conferred and imposed upon the charter of the Nashville & Chattanooga R. Co."

The Central Southern R. Co. was incorporated by the legislature of Tennessee on the 30th of November, 1853, to build a railroad from a point of intersection with the Tennessee & Alabama Railroad at Columbia, by way of Pulaski, to the Alabama state line, in the direction of Athens and Decatur, Ala., to connect with any railroad that might be constructed from Decatur to the state line in the direction of Pulaski. This company also was given "all the powers and privileges," and subjected to "all the restrictions and liabilities prescribed in the charter of the Nashville & Chattanooga R. Co."

The Tennessee & Alabama Central R. Co. was incorporated by the legislature of Alabama on the 19th of December, 1853, to build a railroad from Montevideo, Alabama, in a northeasterly direction, through Decatur, to some point on the boundary between Alabama and Tennessee, to connect with a railroad leading through Pulaski to Columbia, Tennessee. This company was by its charter authorized "to unite and consolidate into one road all or such part of the said road with any railroad that may connect with the said Tennessee & Alabama Central Railroad at the Tennessee line."

Each of these corporations completed its railroad in accordance with the requirements of its charter, and on the 19th of April, 1866, the legislature of Tennessee passed another act, Acts of

Tenn. 1865–6, pp. 217, 220, §§ 5, 6, 9, and 10 of which are as follows:

"Sec. 5. *Be it further enacted*, That for the purpose of uniting and consolidating the Tennessee & Alabama R. Co. and the Central Southern R. Co. into one, the directors of said companies be, and they are hereby, authorized to agree upon the terms thereof, and to adopt all necessary and proper measures, agreements, and obligations to effect the same: *Provided*, said terms of consolidation, when perfected by the directors of said companies, shall be submitted to a vote of the stockholders of said companies, and if assented to by a majority of the stockholders, the same shall be binding upon said companies, and that thereafter, and upon official report thereof to the president of the respective companies and the comptroller of the State, said consolidated and united companies shall be known and styled the 'Nashville & Decatur Railroad Company,' by which name it shall sue and be sued, and be entitled to all the rights and privileges, and be subject to all the liabilities and restrictions, of a body corporate.

"Sec. 6. *Be it further enacted*, That the said Nashville & Decatur Railroad shall, for its government, be entitled to all the rights and privileges, and subject to all the restrictions and liabilities conferred and imposed upon the Nashville & Chattanooga R. Co.: *Provided*, that no state aid is intended to be extended to said Nashville & Decatur Railroad: *And provided further*, that no new liability to the State of Tennessee is intended to be imposed hereby upon said Tennessee & Alabama R. Co. and the Central Southern R. Co.

"Sec. 9. *Be it further enacted*, That the Tennessee & Alabama Railroad and the Central Southern Railroad, thus consolidated, may, through their directors thus elected, be consolidated with the Alabama & Tennessee Central Railroad upon such terms as may be agreed upon between them, and approved by the stockholders of said roads, to be hereafter known as the Nashville and Decatur Railroad, such terms not to be in conflict in anywise with those herein contained, but may be supplementary or in addition thereto: *Provided*, the consolidation herein provided for be approved by act of the legislature of the State of Alabama, heretofore or hereafter passed, and said railroad, thus consolidated, may, by their stockholders, regularly convened, upon thirty days' notice in the newspapers of Nashville and Huntsville, elect directors to serve them for the term of twelve months, and until their successors shall be elected.

"Sec. 10. *Be it further enacted*, That the capital stock of said united companies shall be the aggregate amount of their respective charters, with the addition thereto of ——— dollars; and that this act shall take effect from and after its passage."

Under the authority of this act, and of section 22 of the act to incorporate the Tennessee & Alabama Central Co., the three companies were "united and consolidated under the style of the Nashville & Decatur Railroad," upon the terms indicated in the following resolution confirmed at a convention of the stockholders:

"*Resolved*, That under the authority delegated to the executive committee by the respective stockholders of the Tennessee & Alabama, Central Southern, and Tennessee & Alabama Central railroad companies, the committee have agreed that the capital stock of each company shall represent the value of its road, and that therefore each of the companies herein mentioned shall surrender to the Nashville & Decatur R. Co. all of its rights, franchises, and property; the Nashville & Decatur R. Co. assuming to pay all debts owing by the several companies, and being hereby especially pledged to protect all persons who have made themselves individually liable for the debts of any of the several companies, and that the stockholders of each company shall be entitled to, and receive credit for, the same amount of stock in the Nashville & Decatur R. Co. that they own in any of the several companies; these constituting and comprising the whole basis of settlement."

This union was afterwards confirmed and declared valid by the legislatures of Tennessee and Alabama. The capital stock of the Nashville & Decatur Co. was the aggregate of the stock of all three of the original companies.

Upon these facts the circuit court held that the shares of the capital stock of the Nashville & Decatur Co. were exempt from taxation, and gave judgment accordingly. To reverse that judgment this writ of error was brought.

Samuel Watson, *James M. Head* and *S. A. Champion* for plaintiff in error.

Edward Baxter for defendant in error.

WAITE, C. J.—The question whether the capital stock of the Nashville & Decatur Co. is entitled to the same exemption as that of the Nashville & Chattanooga Co. depends, 1, on whether the grant to the QUESTION. Tennessee & Alabama Co. of "all the rights, powers and privileges," and to the Central Southern Co. of "all the powers and privileges" of the Nashville & Chattanooga Co., carried with it to the new companies the exemption from taxation provided for in section 38 of the Nashville & Chattanooga charter, and, if it did, 2, whether the Nashville & Decatur Co. and its stockholders are entitled to the same exemptions as the original Tennessee corporations and their stockholders had.

As early as 1850, before either the charter of the Tennessee & AUTHORITIES. Alabama Co. or that of the Central Southern Co. was granted, this court said in Philadelphia, Wilmington & Baltimore R. Co. *v.* Maryland, 10 How. 376, 393, speaking by Mr. Chief

Justice Taney, that a statute which authorized the union of two railroad companies, and secured to the united company the "property, rights, and privileges which that law, or other laws, conferred on them [the separate companies], or either of them," extended to the united company an exemption from taxation in the charter of one of the uniting companies, and this although it was at the same time said that "the taxing power of a State is never presumed to be relinquished, unless the intention to relinquish is declared in clear and unambiguous terms." This has been expressly reaffirmed in Tomlinson *v.* Branch, 15 Wall. 460; Humphrey *v.* Pegues, 16 Wall. 244; Southwestern R. *v.* Georgia, 92 U. S. 676; and the correctness of the decision was recognized in Central R. & Banking Co. *v.* Georgia, 92 U. S. 665; Morgan *v.* Louisiana, 99 U. S. 217; Railroad Companies *v.* Gaines, 97 U. S. 697, 711; Railroad Co. *v.* Georgia, 98 U. S. 359, 360; Railroad Co. *v.* Hamblen, 102 U. S. 273, 277; Railroad Co. *v.* Commissioners, 103 U. S. 1, 4; Wilson *v.* Gaines, 3 U. S. 417; Louisville & Nashville R. Co. *v.* Palmes, 109 U. S. 244, 253; Chesapeake & Ohio R. Co. *v.* Miller, 114 U. S. 176, 185.

From this it is clear that, under the settled rule of decision in this court, the exemption from taxation, which was one of the "rights and privileges" of the Nashville & Chattanooga Co., formed part of the charters of the Tennessee & Alabama Co. and the Central Southern Co., unless a different rule is to be applied in Tennessee, because of a supposed limitation on the popular meaning of the words "rights," "powers" and "privileges" when used in statutes, on account of a peculiar provision of the constitution of that State. That constitutional provision is as follows:

"The legislature shall have no power . . . to pass any law granting any individual or individuals rights, privileges, immunities, or exemptions other than such as may be by the same law extended to any member of the community who may be able to bring himself within the provisions of such law; *Provided, always*, that the legislature shall have power to grant such charters of corperations as they may deem expedient for the public good." Constitution, 1834, art. xi., sec. 7.

In view of this the supreme court of Tennessee decided in effect, at its December term, 1877, in Wilson *v.* Gaines, 9 Baxter, 546, that as the State in its constitution used in the same connection all the words "rights," "privileges," "immunities," and "exemptions," each of these words must be given in statutory interpretation a meaning so limited as not to include anything expressed by the others, and that when any one of them is found in a statute the legislature must be conclusively presumed to have used it in this restricted sense. To this we are unable to agree. As has already been seen, the word "privilege," in its ordinary meaning, when used in this connection, includes an exemption from taxation.

This court so decided a year before the charter of the Tenneessee and Alabama Co. was granted, and nearly three years before that of the Central Southern. In fact the supreme court of Tennessee does not seem to doubt that such would be its meaning but for the constitution, for in the opinion it is said, "However comprehensive a meaning may have been given the word 'privilege' by the courts of other States, or by lexicographers, we are constrained to use it in the restricted sense and meaning given it by our laws and the constitution of the State. . . . A legislature acting under this constitution for its powers, and as defining its duties, must be conclusively presumed to have used a word or term of the constitution in the sense and with the meaning given it by that constitution." We see nothing in the constitution which gives to the word "right," or "privilege," or "immunity," or "exemption," any different meaning than that which it has among the people at large. There may be, and probably are, some immunities, and some exemptions, which would not be considered as either rights or privileges in the popular acceptation of those terms. It was to reach such immunities and such exemptions, as it seems to us, that this particular form of expression was used in the constitution, and not to provide that under no circumstances should the word privilege in a statute of Tennessee be held to include a privilege of exemption from taxation. Words in a constitution, as well as words in a statute, are always to be given the meaning they have in common use, unless there are very strong reasons to the contrary. We find no such reasons in this case, and, as an exemption from taxation is a privilege in the popular sense of that term, we feel ourselves compelled to decide that both the Tennessee & Alabama Co. and the Central Southern Co. were granted such an exemption by their charters, notwithstanding the contrary opinion of the supreme court of Tennessee, which, although entitled to great respect, is not binding upon us as authority under the circumstances of this case.

RIGHT TO EXEMPTION.

It only remains to consider whether the Nashville & Decatur Co. is entitled to the same exemption. When two railroad companies unite or become consolidated under the authority of law, the presumption is, until the contrary appears, that the united or consolidated company has all the powers and privileges, and is subject to all the restrictions and liabilities, of those out of which it was created. Tomlinson *v.* Branch, 15 Wall. 460; Branch *v.* Charleston, 92 U. S. 677, 682; County of Scotland *v.* Thomas, 94 U. S. 682, 690; Railroad Co. *v.* Maine, 96 U. S. 499, 512; Green County *v.* Conness, 109 U. S. 104. From this it follows that, as the capital stock of both the original Tennessee corporations was exempt from taxation, the capital stock of the united or consolidated company, formed by the simple aggregation of that of the two old ones, is also exempt, unless it has been provided to

the contrary. Is there, then, anything in the statute authorizing the union which rebuts this presumption? We think there is not. The language relied on to show the contrary intention is this: "That the said Nashville & Decatur Railroad shall, for its government, be entitled to all the powers and privileges, and be subject to all the restrictions and liabilities, conferred and imposed upon the Nashville & Chattanooga R. Co." This is the exact language of the corresponding provision in the charter of the Tennesse & Alabama Co., one of the original companies, save only that the words "for its government" have been added. As we hold that this was sufficient to exempt the capital stock of the original companies from taxation, it follows that the new company is also exempt, unless the added words were intended as a limitation upon the effect of the others.

The rule is imperative that a relinquishment of the taxing power is never to be presumed. Vicksburg, Shreveport & Pacific Railroad *v.* Dennis, 116 U. S. 665. Under this rule, it was held in Railroad Companies *v.* Gaines, 97 U. S. 711, that the capital stock of the Knoxville & Charleston R. Co. was not exempt from taxation, although by its charter that company was (p. 702) "invested, for the purpose of making and using said road, with all the powers, rights, and privileges, and subject to all the disabilities and restrictions that have been conferred and imposed upon the Nashville & Chattanooga R. Co.," because (p. 712) "the grant was not of all the rights and privileges of the Nashville & Chattanooga Co., but of such as were necessary for the purpose of making and using the road, or, in other words, the franchises of the company, which do not include immunity from taxation." To the same effect is Railroad Co. *v.* Commissioners, 103 U. S. 1, where the Annapolis & Elk Ridge R. Co. was "invested with all the rights and powers necessary for the construction and repair" of its railroad, and for that purpose was to have and use all the powers and privileges, and be subject to all the obligations contained in the enumerated sections of the Baltimore and Ohio charter. This we held "was not a grant of all the powers and privileges of the Baltimore and Ohio Company, . . . but only such as were necessary to carry into effect the objects for which the new company was incorporated," or, in other words, "such as were necessary to the construction, repair, and use of its railroad," and this did not include the privilege of exemption from taxation.

In all this class of cases the question is one of legislative intent, with a presumption against an intent to grant an exemption from taxation. Here there is no charter of a new corporation with power to build a new railroad. No new taxable property is created. The legislation contemplates nothing more than the making of one railroad corporation out of two old ones, each of which has a completed railroad and the privilege of an exemption of its cap-

ital stock from taxation. If nothing at all had been said about the powers and privileges of the new corporation, the presumption would have been that it took all which were possessed by the two original companies at the time of there union. To rebut this presumption it is necessary that a contrary intention should appear. The question is not as to a grant of new powers, but as to the taking away of old ones.

Such being the case, we cannot believe that the phrase "for its government" in the consolidating act was intended as a limitation on the powers and privileges of the new corporation. The natural meaning of the word government in such a connection is regulation and control, and we think it was used in that sense here. In reality it neither adds to nor takes from the force of the other words, and simply implies that the new corporation shall have the same charter rights and privileges, and be subject to the same charter restrictions and liabilities, as the Nashville & Chattanooga Co. Such were the charters of the old companies, and such was intended to be the charter of the new; no more, no less. As was said in the court below, "the government of the corporation embraces every part of the conduct and business of the company in all its relations to the State, to the general public, to individuals, to its own stockholders," and consequently the grant of powers and privileges for its government was in reality the grant of the powers and privileges of its corporate entity.

The fact that the Tennessee & Alabama Central Co. was under the authority of the consolidating statute brought into the consolidated company does not, in our opinion, alter the case in any material respect. No new taxable property was in fact brought into Tennessee in this way. While it added to the amount of the capital stock of the consolidated company, it was only because of capital actually invested before the consolidation in the Alabama railroad, and taking the whole statute together, it is apparent to us that the legislature intended to give the new corporation in Tennessee all the powers and privileges, including exemption from taxation, which the old corporations were entitled to. In fact we do not understand it is claimed that the rights of the parties, in respect to the present question, are changed because the two original Tennessee companies, after their union, were consolidated with the Alabama corporation.

We conclude, therefore, that the capital stock of the Nashville & Decatur Co. is exempt from taxation in Tennessee, and consequently, for the reasons stated in the other case, that the shares cannot be assessed. The judgment of the court below to that effect is affirmed.

Exemption from Taxation.—See Co. of Santa Clara v. South Pac. R. Co. 13 Am. & Eng. R. R. Cas. 182; Cent. Pac. R. Co. v. State Board, 13 Am. & Eng. R. R. Cas. 256; Worth v. Wilmington, etc., R. Co. 13 Am. & Eng. R.

R. Cas. 386; Memphis, etc., R. Co. *v.* Loftin, 13 Id. 377; State *v.* Montclair, etc., R. Co. 13 Id. 390; Cooper *v.* Corbin, 13 Id. 394; International, etc., R. Co. *v.* Anderson, 13 Id. 660; Wisconsin Cent. R. Co. *v.* Lincoln Co. 13 Id. 663; Northern Pac. R Co. *v.* Carland, 17 Id. 364; Little *v.* Bowers, 17 Id. 405; State *v.* Whitworth, 17 Id. 411.

STATE

v.

NORTHERN PACIFIC R. Co.

(*Advance Case, Minnesota. December* 17, 1886.)

A line of railroad from Brainerd to Watab, formerly a part of the chartered line of the St. Paul & Pacific R. Co.,, was constructed by the Western R. Co. of Minnesota in 1877–78, under chap. 201, Sp. Laws 1877, by force of which act the forfeited franchises, privileges, and immunities of the former corporation, appertaining to this line of road, were transferred to the latter company. *Held*, that the same obligation, as respects the percentage of earnings to be paid to the State in lieu of taxation, attended the franchises and immunities thus transferred, as the original company would have been subject to if it had constructed this line of road. Hence, pursuant to the provisions of chap. 6, Sp. Laws 1865, this defendant, operating this section of road under lease from the Western R. Co., was liable to pay to the State, for the year 1885, *three* per cent of the gross earnings therefrom.

The percentage required to be paid to the State by a railroad corporation accepting the provisions of chap. 111, Sp. Laws 1873 (prescribing the percentage of earnings to be paid by the St. Paul, Stillwater & Taylor's Falls R. Co.), pursuant to section 2 of that act, is to be graduated with reference to the time of the completion of 30 miles of its own line of road, and not with reference to the fixed date named in that act with respect to the St. Paul, Stillwater & Taylor's Falls R. Co.

This construction applied to the line from Watab to Minneapolis, operated by this defendant, subjects it to the payment of 1 per cent of its gross earnings.

APPEALS from district court, Ramsey county.

W. J. Hahn, atty. gen., and *J. M. Martin* for the State.

W. P. Clough for respondent and appellant, Northern Pac. R. Co.

DICKINSON, J.—This is an action to recover a percentage of the gross earnings of the defendant, for the year 1885, from two different sections of the line of railroad operated by it. The circumstances affecting the obligation of the defendant are different in respect to the two sections of road referred to, and will be separately considered. FACTS.

The line extending from Brainerd to Watab was a part of the line over which the Minnesota & Pacific R. Co. was by the act of 1857 (Extra Sess. 1857, *c.* 1), and by subsequent enactments, authorized to construct its road. This not having been constructed by that company, nor by its successor, the St. Paul & Pacific R. Co., chapter 201 of the special laws of 1877 was enacted, declaring the rights, privileges, franchises, and grants of that corporation, appertaining to this line, to be forfeited to the State, without merger or extinguishment, and that the same were continued and conferred as in that act provided. Upon conditions not important to be here mentioned, it further provided that "any company or corporation now organized, or that may hereafter organize, having authority from this State to build, maintain, and operate a line of railroad within or through the State, may succeed to and acquire the right to complete, own, maintain, and operate" this line, "by filing with the governor a written notice of its desire and intention, under and subject to the provisions of this act, to complete" the same. Section 7 provides that "any company acting under and pursuant to the provisions of this act shall become entitled to and invested with all and singular the rights, privileges, immunities, franchises, lands, and property appertaining to the portion of road it shall complete, which were formerly held by, or which formerly belonged to, the St. Paul & Pacific R. Co., or which were formerly granted to the St. Paul & Pacific R. Co. . . ." The Western R. Co., of Minnesota, which had theretofore been created, under the general laws of the State, for the construction of a road from Brainerd to Sauk Rapids, and thence to Minneapolis and beyond, accepted and availed itself of the provisions of this act of 1877, in the manner therein designated, and under and by virtue of that act constructed this line, completing it before the first day of May, 1878. That corporation then leased the road to this defendant, which has ever since operated it.

By chapter 6 of the special laws of 1865, modifying the provisions of the original charter of 1857, above referred to, the St. Paul & Pacific R. Co. was declared to be forever exempt from assessment and taxation, in consideration of the payment to the State yearly of one per cent of the gross earnings of the railroad during the first three years after 30 miles of the same should be completed and in operation; 2 per cent during the next seven years; and 3 per cent from and after the expiration of 10 years from the completion of 30 miles of road.

The controversy is as to whether the percentage to be paid in accordance with the act of 1865, in respect to this line of road, is to be determined with regard to the time when the St. Paul & Pacific R. Co. completed and put in operation 30 miles of its road, or system of roads, or only with regard to the time of the construction of this particular line of road, or of 30 miles of the

same, by the Western R. Co. If the former is the rule to be be applied, the defendant is chargeable with 3 per cent of its earnings for the year 1885; if the latter rule is applied, it is chargeable with only 2 per cent.

If this line of road had been constructed and operated by the St. Paul & Pacific R. Co., or by any company deriving from that corporation, and under the peculiar provisions of its charter, a separate corporate existence, there can be no doubt that, pursuant to the provisions of the act of 1865, it would have been required to pay 3 per cent of its gross earnings for the year 1885. After the construction and putting in operation of 30 miles of road composing any part of the entire line or system of the St. Paul & Pacific R. Co., the rate per centum prescribed by the act of 1865 became at once applicable to the entire system, so far at least as the same was constructed and operated by that company, or by any corporation deriving its existence from it. This was decided in Chicago, M. & St. P. R. Co. *v.* Pfaender, 23 Minn. 217.

The rights and obligations of the Western R. Co. in respect to this line were such as were conferred and imposed by the act of 1877. When that act was passed, the time had already become fixed, by the construction of 30 miles of the St. Paul & Pacific road, from which the percentage prescribed by the act of 1865 was to be computed; and the State had become entitled to receive, and the St. Paul & Pacific Co. had been obligated to pay, the percentage, so determined, of the earnings, not only of so much of the whole road or system as had then been constructed, but also of what might thereafter be constructed under the charter of that company. That obligation of the corporation towards the State on the one hand, and on the other the franchises, grants, and privileges which the corporation had received and enjoyed from the State, were parts of an entire plan embodied in the charter and legislation above referred to. The grant was subject to the prescribed obligation. The one was a consideration for the other. Not only was this the situation when the act of 1877 was passed, but, by the decision of this court in Chicago, M. & St. P. R. Co. *v.* Pfaender, filed in November, 1876, this obligation has been declared and was, as must be presumed, known to the legislature. The act of 1877 is to be construed in the light of these circumstances.

The question then is whether, by that act, the legislature intended to confer upon any corporation which should construct and put in operation this line of road all franchises, grants, and privileges which the St. Paul & Pacific Co. had before enjoyed, discharged of its reciprocal obligations towards the State; QUESTION. or whether the obligation was to attend the privileges thus transferred. In our opinion, the act can only be reasonably construed as transferring to the succeeding corporation the rights and franchises of the St. Paul & Pacific Co., with respect to this line of

road, as the same had been enjoyed by that company, and not freed from the attendant obligations.

Among the "immunities" and "privileges" which had been enjoyed by the St. Paul & Pacific Co., and to which such succeeding corporation was, by the terms of the act, to become entitled, was its exemption from ordinary assessment and taxation. But this exemption had been granted to and enjoyed by the original company only in consideration of its paying to the State, in place thereof, a prescribed percentage of its earnings; and it cannot reasonably be supposed that the legislature would, if, indeed, it could, have granted or continued such an exemption, unless coupled with that or some like obligation. If the act of 1877 were to be construed as transferring to such corporation as might comply with its provisions the privileges and immunities of the former corporation, disconnected from this duty, it might well have come to pass that, so far as appertained to this line of road, the corporation constructing and operating it, with all of its property, would have been wholly exempt, both from direct taxation and from any charge in the nature of taxation. This would have been the result if we suppose a corporation subject to the general law of the State as respects taxation to have accepted the provisions of this act, and to have constructed and maintained the road. It would not, as respects this property, have been subject to ordinary assessment and taxation; for exemption therefrom was one of the expressly granted "immunities" of the former corporation, which the succeeding corporation would have acquired under this act; and, by the terms of our hypothesis, such succeeding corporation would not be chargeable with a percentage of its gross earnings. Whether, in fact, the Western R. Co. was or was not subject to the general tax law of the State in 1877 does not appear, but that is not important for the purpose of construing this act so as to arrive at the intention of the legislature; for "any company" organized under the general law of the State, and subject to the general tax law, might have availed itself of the privileges of this act, and have constructed the road.

EXEMPTION FROM TAXATION.

2. The second branch of the case relates to the line of road from Watab to Minneapolis. This was constructed by the Western R. Co. of Minnesota as a part of its line, and was completed about July, 1884. Prior to that year 30 miles in length of the same had not been constructed. At about the time of the completion of this line it was leased by the Western R. Co. (then known as the St. Paul & Northern Pacific Ry. Co.) to this defendant, the Northern Pacific R. Co., by which corporation it has since been operated. On or about the 18th day of September, 1884, the St. Paul & Northern Pacific Ry. Co., in accordance with the provisions of section 2 of chapter 111 of the Special Laws of 1873 (Gen. St. 1878, *c.* 11, § 129), accepted and became subject to that law as

to this line of road. By the terms of section 1 of that act the St. Paul, Stillwater & Taylor's Falls R. Co. was to pay to the State, on or before the 1st day of March of each year, 1 per cent of its gross earnings, for three years from and after January 1, 1872; 2 per cent for the seven years next thereafter; and 3 per cent "from and after the expiration of ten years from the said 1st day of January, 1872." Section 2, above referred to, provides that "any railroad company owning or operating, or which may hereafter own or operate, any line or lines of railroad in this State, may, by resolution of its board of directors, attested by its secretary, and filed with the secretary of state, accept and become subject to the provisions of this act; and, in such case, the payment of such percentage in lieu of taxes, in accordance therewith, shall commence from and after the 1st day of March next, after the completion of 30 miles of such line hereafter built, or of the entire line, if the same shall be less than 30 miles in length."

It is claimed, on the part of the State, that, by accepting and becoming subject "to the provisions of this act," the railroad company, as to this line, became subject at once to the payment of the same percentage of its earnings as the St. Paul, Stillwater & Taylor's Falls R. Co. was then required to pay; that 10 years having already expired since "the said 1st day of January, 1872," 3 per cent of the gross earnings was chargeable without regard to the time when this line of road was constructed. This construction of the act cannot be sustained. "The provisions of this act," which may be accepted by any railroad company, comprise not merely such as are found in section 1, but that in section 2, above recited. The words "thirty miles of such line" refer to the "line or lines" mentioned in the first part of the same section,—that is, to the line of "any railroad company" which may accept the provisions of the act,—and not to the line of the St. Paul, Stillwater & Taylor's Falls R. Co., which company is not named in that section. We think the purpose is clearly expressed, to subject any railroad company which, being within the terms of the act, may accept its provisions, to the payment yearly of a percentage graduated with reference to the time of the completion of the first 30 miles of its own line of road; 1 per cent being payable during the first three years after that event, 2 per cent during the next seven years, and 3 per cent thereafter. This is in accordance with a policy which has been so generally adopted with respect to the railroad system of the State, and had been when the act of 1873 was passed, that it affords reason in support of the construction which is by far the most natural from the letter of the act itself.

PAYMENT OF EARNINGS IN LIEU OF TAXES.

In making special provision as to a particular existing corporation, as the St. Paul, Stillwater & Taylor's Falls Co., the legislature, being informed in respect to the progress of construction,

could fix definitely the date from which the prescribed percentage should be computed, and thus accomplish, as to that road, the general purpose of charging a percentage, graduated with reference to the commencement of the enterprise. To accomplish a like purpose as to railroads generally, and by an enactment general in its nature, it was necessary to provide for the commencement of the percentage with reference to the unknown time when construction to the required extent should be completed. Obvious reasons led to the adoption of the policy of graduating the percentage to be paid by a railroad company with regard to the beginning of that particular enterprise. It would be more difficult to assign a reason which could have induced the legislature to provide for making the fixed date when such a graduation of percentage should commence, as to a particular designated road, applicable, without change of such date, to all roads which might at any time thereafter be constructed.

It is further claimed by the State that at least the defendant should be charged with 2 per cent in respect to this line, because it and the line from Brainerd to Watab, completed in 1878, were constructed by the same company, and are parts of a continuous and entire line of road. But, for the purposes of the application of the act of 1873, we consider that those two sections of road must be deemed to be distinct and separate lines. In the first part of this opinion, reasons have been stated for holding that the line from Brainerd to Watab is, for the purpose of the computation of the percentage to be paid, to be treated as a part of the line of the St. Paul & Pacific Co., and not as though it had been constructed under the charter of the Western R. Co. The same reasons now forbid that the construction of that line should be deemed to have been the "completion of thirty miles" of a different line, of which that from Watab to Minneapolis is a constituent part, so as to affect the rate of percentage now required to be paid in respect to the latter line under the act of 1873. The franchises pertaining to the one road are those originally granted to the Minnesota & Pacific Co. in 1857, and subsequently transferred to the St. Paul & Pacific Co.; and the taxation of that line is controlled by the special enactment relating to that corporation. The franchises of the other road are such as were acquired by the Western R. Co. by its organization under the general law, and it is taxed in accordance with the provisions of the act of 1873. Our conclusion is that, pursuant to the terms of that act, this line is chargeable yearly with only 1 per cent of its gross earnings during the three years next after the date of the completion of 30 miles of the line, not regarding that line of road constructed under the charter of the St. Paul & Pacific Co.

Upon both branches of the case our opinion is in accordance with that of the learned judge whose decision is here in review, and the order appealed from is affirmed.

In re Proceedings to Enforce Payment of the Taxes on Real Estate Remaining Delinquent on the First Monday of January, 1886, for the County of Stevens, State of Minnesota.

(*Advance Case, Minnesota. March* 2, 1887.)

First Division St. P. & P. R. Co. *v.* Marcher, 14 Minn. 297 (Gill. 224), and other cases, followed; holding that the exemption from ordinary taxation, originally created in favor of the Minnesota & Pacific R. Co., passed, with the lands to which it was appendant, to the St. Paul & Pacific R. Co., and to the First Division of the St. Paul & Pacific R. Co.

That right of exemption being a contract between the State and the corporation, the Minnesota act of March 2, 1865 (Sp. Laws, c. 6), modifying that exemption, was ineffectual until accepted by the corporation. It not appearing that this was accepted until after the act of March 4, 1865 (Sp. Laws, c. 9), the latter act (protecting as against tax proceedings the title remaining in the corporation after the lands had been contracted to be sold) is to be deemed a tender by the State of a new contract, which upon acceptance became effectual.

It being established by the admission of the parties that this respondent succeeded to the ownership of certain lands formerly granted to and held by the Minnesota & Pacific R. Co. and its successors, and to the exemption from ordinary taxation formerly enjoyed by those corporations, and pertaining to such lands, *held*, that the title remaining in the respondent after it had contracted to sell such lands (the purchase price being still unpaid, and the conditions of the purchase being still unperformed) is protected, in accordance with the terms of the act of March 4, 1865, from sale for taxes.

Held, following former decisions, that the provisions of law relating to such exemption (originally created prior to the adoption of the constitution) are not unconstitutional.

The Minnesota act of March 4, 1865, was not repealed by the general tax law of 1878.

CERTIFIED up from district court, Stevens county.

C. L. Brown (*H. H. Phelps*, of counsel) for county of Stevens, appellant.

R. B. Galusha (*Young & Lightner* and *S. L. Campbell*, of counsel) for St. Paul, M. & M. R. Co., respondent.

DICKINSON, J.—There is here presented the question of the taxability of the estate or interest which the St. Paul, Minneapolis & Manitoba R. Co. has in its lands after the same have been contracted to be sold, but before payment of the purchase price, or the performance of the contract conditions so as to entitle the purchaser to a conveyance. In the tax-list filed in the office of the clerk of the district court the lands in controversy were charged with taxes for the year 1884. The railroad company interposed an answer setting forth the facts, which, as is claimed, show that its estate in the lands is exempt from taxation. The facts as

FACTS.

alleged in the answer were stipulated to be true, and were so found by the court. It will be sufficient for the understanding of the case to here allude to these facts, without restating them except in some particulars. The case thus presented comprises the facts of incorporation of the Minnesota & Pacific R. Co., by the territorial act of May 22, 1857, and the regranting to that corporation of congressional grant of lands, made in that year to the Territory to aid in the construction of that line of road, and the exemption from ordinary taxation of such granted lands "till sold and conveyed by said company," in consideration of the annual payment of a percentage of its gross earnings; the subsequent revesting in the State of the franchises, privileges, land, and property of that corporation, and that the same were regranted by the State to the St. Paul & Pacific R. Co. by the act of March 10, 1862; the due organization as a corporation, in 1864, of the First Division of the St. Paul & Pacific R. Co., and that the same became the owner of the so-called "Main Line" of that road, and of all the lands granted to aid in the construction thereof, and of all the property, rights, franchises, immunities, and exemptions of the Minnesota & Pacific R. Co. and the St. Paul & Pacific R. Co. relating to said line, or to said granted lands; that such organization of the First Division Co., and its title to the road, lands, franchises, immunities, and exemptions were duly confirmed by a public law of the State approved February 6, 1866; the additional congressional grant of March 3, 1865, to aid in the construction of the lines of the St. Paul & Pacific R. Co., and the regranting of the same by the State to that corporation, by the act of March 2, 1865; the legislative enactment of March 4, 1865, entitled "An act in relation to the taxation of lands granted to the St. Paul & Pacific R. Co.," providing, among other things, that, whenever any of these lands should be "contracted to be sold," they should be placed upon the tax-list for taxation as other real estate, but that, in enforcing the collection of the taxes thereon, the title or interest of the said company, or of any trustees or mortgagee thereof, should be in nowise impaired or affected thereby, but that the improvement thereon, and all the interest of the purchaser, should be sold, in case of default, in the payment of the tax; the due acceptance of that act of March 4, 1865, by both the St. Paul & Pacific and the First Division companies, in the manner designated in the act; that thereupon the said law became, and has ever since been, obligatory upon the State and upon the said companies, and upon this respondent as their successor, and that the same, and the contract therein expressed, has never been altered, repealed, or rescinded; the due organization of this respondent as a corporation under the general law of the State, and especially under chapter 30 of the General Laws of 1876; that by purchase at mortgage foreclosure sale in 1879, this respondent became and still is the owner in fee of all that part of the lines of

the several roads above referred to, extending from St. Anthony to Breckenridge, formerly known as the "Main Line of the First Division of the St. Paul & Pacific R. Co.," and of the lands granted by the United States by several acts of Congress, and by the State regranted to said companies, or either of them, to aid in the construction of said main line, and of all the property, rights, franchises, immunities, exemptions, and privileges at any time possessed by said companies, or either of them, including the exemption from ordinary taxation, heretofore mentioned, pertaining to said line of railroad and said granted lands, which purchase by this respondent, and its right and title to all said line of railroad, lands, property, rights, franchises, immunities, exemptions, and privileges, were fully confirmed to this respondent by an act of the legislature of this State, approved March 7, 1881, entitled "An act confirming the organization and certain purchases of the St. Paul, Minneapolis & Manitoba R. Co.," etc.; that the lands here in question are a part of the lands granted by Congress and by the State to aid in the construction of said main line, and ever since the year 1879 have been and now are owned in fee by this respondent, although the same have been by it contracted to be sold, but the purchasers have not paid the purchase price, nor performed the conditions of their contracts of purchase, so as to be entitled to a conveyance of the lands.

That the exemption from ordinary taxation, created in 1857 in favor of the Minnesota & Pacific R. Co., subsequently passed with the lands, and, as a right appendant thereto, to the St. Paul & Pacific R. Co. and to the First Division of the St. Paul & Pacific R. Co., may be now accepted without question. It was so decided 18 years ago in the case of the last-named company *v.* Parcher, 14 Minn. 297 (Gil. 224), which decision has been ever since followed. State *v.* Winona & St. P. R. Co., 21 Minn. 315; Minnesota Cent. R. Co. *v.* Melvin, *Id.* 329; Chicago, M. & St. P. R. Co. *v.* Pfaender, 23 Minn. 217; City of St. Paul *v.* St. Paul & S. C. R. Co., Id. 469, 475; County of Nobles *v.* Sioux City & St. P. R. Co., 26 Minn. 294, 3 N. W. Rep. 701; State *v.* Northern Pac. R. Co., 32 Minn. 294, 20 N. W. Rep. 234. In the Parcher Case, *supra*, the doubt was expressed as to whether the granted immunity from taxation was a franchise of the Minnesota & Pacific Co., which, after resumption by the State, had been included as such in the franchises reconferred upon the St. Paul & Pacific Co. The decision in that case was not put upon that ground, but its correctness has received support from a late decision of the supreme court of the United States declaring an immunity from taxation to be a franchise. Given *v.* Wright, 117 U. S. 648, 6 Sup. Ct. Rep. 907. We are not disposed to reconsider a question so long settled, and so often recognized as settled, in this court; and will only add that we do not think that the decision

Exemption from taxation.

in the Parcher Case, sustaining the exemption in favor of the successors of the Minnesota & Pacific R. Co., has been disturbed by the decisions of the supreme court of the United States.

Assuming, then, that the exemption created in 1857 passed, with the lands, unimpaired to the successors of the Minnesota & Pacific Co., we come to consider how that right was affected by the acts of March 2 and March 4, 1865 (chapters 6 and 9, Sp. Laws 1865). By the terms of the earlier of these acts it was provided that the lands of the St. Paul & Pacific Co. should be subject to taxation as soon as sold, leased, or contracted to be sold or leased. For the purpose of this case it is unnecessary to consider what would have been the effect of this enactment if, without modification, it had been accepted by the corporation; for it does not appear that there was any acceptance of the provisions of that act prior to the enactment of March 4. The modification of the right of exemption expressed in the act of March 2 (assuming that, standing alone, it should be construed as rendering the title still remaining in the railroad company taxable as soon as the lands should be contracted to be sold) could only have been made effectual by the assent of the corporation; for the exemption previously existing was a contract right, which the State alone had not the power to impair. First Div., etc., Co. *v.* Parcher, 14 Minn. 297–326 (Gil. 224). Nor until its acceptance, at least, was the act of March 2 effectual to place any constitutional restraint upon the power of the legislature to enlarge the exemption proposed in it, so that the exemption created in 1857 should be subject to a less restriction or limitation than was expressed in the act of March 2. From the facts as presented in this case the act of March 4 appears to have been an offer on the part of the State of another and a modified term respecting the taxation of the lands, in place of that embraced in contract tendered in the enactment of two days previous, so as to protect from taxation the interest of the corporation in its lands, but subjecting that of the purchaser to the operation of the tax laws. This, if it did not restrict, did not enlarge, the previously existing exemption, and, being accepted by the corporation, was subject to no constitutional objection. It is not disputed that the exemption here claimed and allowed by the court below is such as was expressed in the act of March 4.

The point that sections 1 and 3 of article 9 of the constitution forbid this legislation was long ago settled in the Parcher Case, above cited, and in the cases of State *v.* Winona & St. P. R. Co., *supra*, and City of St. Paul *v.* St. Paul & S. C. R. Co., *supra*; it being held that those sections of the constitution did not prevent the legislature from modifying the terms of a provision for the payment of a percentage of gross earnings in lieu of other taxation, in a case where that method of taxation had been established prior to the adoption of the constitution, and, in the latter case cited,

that by the constitutional amendment of 1871 (section 32, article 4) such legislation had been confirmed.

The claim that the act of March 4 is inconsistent with the general tax laws of 1878, and so was repealed thereby, cannot be sustained. We need not here enter into an examination of these laws to determine whether they are inconsistent; for the prior enactment embodied the elements of a contract between the State and the corporation, which had been in force and acted upon both by the State and by the company for many years, and its annulment by the act of the State alone was impossible under the federal constitution. Again, such a repeal would be contrary to the constitutional amendment of 1871, above referred to, by which the legislature was prohibited, without the direct concurrence of the people, from repealing or amending any law providing for the payment by any railroad company of a percentage of its gross earnings in lieu of other taxes and assessments upon its real estate, road, etc. But, aside from these considerations, it is an admitted fact in the case that this law has never been repealed.

But it is contended that this exemption in favor of the First Division of the St. Paul & Pacific R. Co. never passed to this respondent; that the mortgage through which its title was derived was not in terms sufficient to include the right in question. But by the admitted facts, to which we have referred, the contrary is established, for the purposes of this case, and we forbear considering this question, upon which, as was intimated by the attorney-general when the cause was presented, he should have desired to be heard on the part of the State if the question had been open for consideration. And for the same reason the constitutionality of the act of 1881, confirming in this respondent its asserted rights, will not be considered. It is unimportant, except as it might bear upon the facts as to the acquirement by the respondent of the title to these lands with the pre-existing right of exemption, which facts are admitted.

Our conclusion is in accordance with that of the learned judge whose decision is in review, and his determination in the premises is affirmed.

HUNTINGTON *v.* WORTHEN.

LITTLE ROCK AND FORT SMITH R. *v.* WORTHEN.

(130 *United States*, 97.)

The statute of Arkansas of March 31, 1883, § 46, which directs the board of railroad commissioners not to include the embankments, tunnels, cuts, ties, trestles, or bridges of railroads in the schedule of the property of railroad companies, prepared by them for the purpose of assessment of taxes, is in conflict with the provisions in the constitution of the State of 1874, relating to the assessment and taxation of property within the State.

FIRST-NAMED case: Appeal from the circuit court of the United States for the eastern district of Arkansas.

Second case: Error to the supreme court of Arkansas.

The following is the case stated by the court:

In the first of the above-entitled cases the plaintiff, the Little Rock & Fort Smith R., is a corporation created under the laws of Arkansas, and operates a railroad from Little Rock to Fort Smith in that State, running through several counties in its route. The defendants are the sheriffs of those counties, and *ex officio* collectors of taxes therein. The suit was brought to enjoin them from collecting certain taxes assessed and levied for the year 1885 on what is termed in the revenue act of the State as the "railroad track" of the corporation, upon the alleged ground that the board of railroad commissioners of the State exceeded its powers by including unauthorized elements in the estimate of its value. That term, "railroad track" embraces all fixed railroad property of the corporation, and is assessed for purposes of taxation as real estate.

In the second of the above-entitled cases the plaintiffs, who are citizens of Massachusetts, and trustees under a mortgage executed by the railway company upon its railroad and land grant, filed their bill of complaint against the same collectors to restrain the collection of the same taxes. Subsequently the bill was amended by joining the county clerks of the several counties on the line of the railway as defendants, with prayers for injunctions restraining them from doing the several acts which the revenue act requires them to perform in connection with and subsequently to the sale of the railroad track.

By a statute of Arkansas, passed in 1883, the governor, secretary of state, and auditor of public accounts were constituted a board of railroad commissioners for the State, and required on the first Monday of April of each year to ascertain the value of all property, real and personal, of every railroad company existing under the laws of the State, including therein the railroad track, rolling-stock, water

and wood stations, passenger and freight depots, offices, and furniture. And it was made the duty of the company in March, 1883, and every second year thereafter when required, to prepare and file with the secretary of state a statement or schedule showing the length of its main and side tracks, switches, and turn-outs in each county, in which the road is located, and in each city and town through or into which its road may run; also the value of all improvements, stations, and structures, including the railroad track located on the right of way; but the statute declares that "such schedule shall not include, nor value embankments, tunnels, cuts, ties, trestles, or bridges."

The statute also required the board of railroad commissioners to meet on the first Monday of April in each year, at the office of the secretary of state, and examine the lists or schedules of the description and value of the railroad track of the railroad companies filed with the secretary of state; and if the schedules are made out in accordance with the provisions of the act, and, in the opinion of the board, the valuation of the railroad track is fair and reasonable, it shall appraise the same, and the secretary of state shall certify to the assessor of each county, in which the railroad is located, so much of the list as values the railroad track located in the county and in any city or town thereof; and the assessors shall list and assess the same as real estate.

The Little Rock & Fort Smith R., under this statute, made a return of the length of its main and side tracks; and of the value thereof; and of the improvements and structures, including the railroad track, on its right of way, but omitted in its estimate the value of the embankments, tunnels, cuts, ties, trestles, and bridges, following in this respect the directions of the statute.

At a subsequent meeting the board passed a resolution declaring that all property of railroad companies in the State should be assessed at its true value, without regard to the restrictions and limitations mentioned, by which the value of the embankments, tunnels, cuts, ties, trestles, and bridges is excluded from the schedule of their property; that, after full examination and consultation, it had determined that such limitations and restrictions were unconstitutional, and that it was not bound thereby. The several railroad companies were, therefore, requested to render full statements of their property of whatever kind or description, and the true value thereof, without regard to the restrictions and limitations mentioned. A hearing was accorded to the companies by the board; but its conclusion was not changed, and it proceeded to include in the assessment of the railroad track the value of the embankments, tunnels, cuts, ties, trestles, and bridges. The assessment was thereby largely increased. The plaintiff thereupon commenced the present suit to restrain the collection of the taxes, setting forth the matters above mentioned, and alleging that it was unable to state to what

extent the assessment of its property was increased by this action of the board, as the increase was incapable of separation from the whole. It charged, therefore, that the whole assessment was vitiated and rendered void by this unlawful action of the board, and prayed an injunction to restrain the collection of the taxes based upon it.

The defendants appeared in the suit and demurred to the complaint. The court in which the suit was commenced sustained the demurrer and dismissed the suit. The supreme court of the State, on appeal, affirmed the decree of the court below, and the case is now brought here for review.

In the second suit—the one from the federal court—the defendants appeared and pleaded in bar the decree in the above case in the state court, and also, by leave of the court, demurred to the complaint. The court sustained the demurrer and dismissed the bill. From its decree the case is brought here on appeal.

C. W. Huntington for appellants and plaintiff in error.

Daniel W. Jones, attorney-general of Arkansas, for appellees and defendants in error.

FIELD, J.—The constitution of Arkansas of 1874 provides that "all property subject to taxation shall be taxed according to its value, to be ascertained in such manner as the general assembly shall direct, making the same equal and uniform throughout the State," and that "no one species of property, from which a tax may be collected, shall be taxed higher than another species of property of equal value."

The following property is declared to be exempt from taxation: "Public property used exclusively for public purposes; churches used as such; cemeteries used exclusively as such; school buildings and apparatus; libraries and grounds used exclusively for school purposes; and buildings and grounds and materials used exclusively for public charity." And the constitution declares that "all laws exempting property from taxation other than is provided" therein "shall be void."

As thus seen, no part of the property of railroad companies in the State is exempt from taxation, and any law which exempts it is in express terms declared to be void. But laws which indirectly produce such exemption must be equally inoperative. That cannot be accomplished indirectly which the organic law declares shall not be done directly. The assessment of property, that is, the appraisement and estimate of its value, is the basis upon which the amount of the tax is fixed. A law, therefore, omitting from assessment portions of any particular property, thus lessening the estimate of its value, has the effect of exempting it to that extent from taxation. That result cannot be accomplished, as well observed by the

EXEMPTION OF RAILWAY PROPERTY FROM TAXATION.

supreme court of the State, under the guise of regulating the duties of assessors.

When, therefore, under the advice of the attorney-general, the board of railroad commissioners treated as invalid the direction of the statute that the value of embankments, tunnels, cuts, ties, trestles, and bridges should not be included in the estimate of the railroad track, it obeyed the constitution, rather than the legislature. It may not be a wise thing, as a rule, for subordinate executive or ministerial officers to undertake to pass upon the constitutionality of legislation prescribing their duties, and to disregard it if in their judgment it is invalid. This may be a hazardous proceeding to themselves, and productive of great inconvenience to the public; but still the determination of the judicial tribunals can alone settle the legality of their action. An unconstitutional act is not a law; it binds no one. Here the conflict between the constitution and the statute was obvious, and the board had the advice of the highest legal officer of the State; and his conclusion was sustained by the judgment of the supreme court of the State. The unconstitutional part of the statute was separable from the remainder. The statute declared that, in making its statement of the value of its property, the railroad company should omit certain items; that clause being held invalid, the rest remained unaffected, and could be fully carried out. An exemption, which was invalid, was alone taken from it. It is only when different clauses of an act are so dependent upon each other that it is evident the legislature would not have enacted one of them without the other—as when the two things provided are necessary parts of one system—that the whole act will fall with the invalidity of one clause. When there is no such connection and dependency, the act will stand, though different parts of it are rejected.

As to the objection which the counsel of the plaintiffs in error in the state case, and of the appellants in the federal case, raise, that the action of the board of railroad commissioners was in conflict with that clause of the fourteenth amendment of the constitution of the United States, which declares that no State shall deprive any one of property without due process of law, we can only say, we do not perceive its application. The complaint of the plaintiffs in error and appellants is, that the board of railroad commissioners did not follow the act of the legislature. If that act was valid, no ground lay for complaint that the State had done anything to deprive the company of its property without due process of law. If the act was, in the particulars mentioned, unconstitutional, as the supreme court of the State afterwards held, there was no just ground of complaint that the railroad commissioners had refused to follow its directions.

In the state case the writ is dismissed, there being no federal question involved. In the federal case, the decree of the court below is affirmed.

ST. JOHNSBURY AND LAKE CHAMPLAIN R. CO.

v.

HUNT.

(*Advance Case, Vermont. January* 1, 1887.)

In an action for malicious prosecution by a railroad company for causing the delay of a train by reason of the arrest of the engineer in an action for damages for killing a heifer on the track which the company had failed to fence, the defendant, as tending to show a cause of action, offered to prove that plaintiff had not performed its statutory duty to fence, and that he had been injured thereby. *Held*, admissible.

Where a party, before commencing suit, takes competent legal advice on a full and correct statement of all the material facts known to him, or that he had reason to believe existed, and acted honestly upon it, believing he had a cause of action, it is a defence.

A decision on demurrer is conclusive in subsequent proceedings in the case when nothing further bearing upon the point appears.

The word "agents," as used in section 3412, R. L. Vt., making railroads and their agents liable for injury to animals by reason of a failure to fence their tracks, includes engineers.

EXCEPTIONS from Caledonia county court, June term, 1885, Ross, J., presiding.

Defendant, Hunt, brought suit, and recovered judgment against one Collins, an engineer of the plaintiff in this suit, for injury to a heifer struck by one of plaintiff's locomotives in charge of said Collins. Collins was arrested while on duty, thereby delaying an important train. This suit was brought by the railroad company to recover damages for such delay. The declaration alleged, in substance, that said suit was brought without any just cause of action against said Collins, and for the sole purpose of injuring the plaintiff. On demurrer it was held (55 Vt. 570) that the declaration was sufficient, and that there was nothing alleged to make the judgment in Hunt *v.* Collins an estoppel on this plaintiff; and the cause was remanded for trial.

On the trial the defendant, as tending to show that he had a cause of action against said Collins, offered to show that plaintiff had not performed its statutory duty as to fences and cattle-guards, and that said heifer got on the track for want thereof. The statute (R. L. §§ 3407–3412) requires railroad companies to maintain sufficient fences and cattle-guards, and makes them and their agents responsible for damage caused by the want thereof. The court excluded the evidence, to which the defendant excepted.

The defendant offered in evidence a duly certified copy of record

in Hunt *v.* Collins as tending to show that he had a cause of action against said Collins. The court excluded the evidence, to which the defendant excepted.

The defendant introduced evidence tending to prove that, before he commenced his suit against Collins, he consulted an attorney "of competence and integrity," and disclosed to him all the facts attending the injury, and the agency of said Collins in causing said injury, and asked the court to charge that such consultation and advice, if honestly followed, would make a full defence; but the court refused so to charge, and charged that such conduct on the part of the defendant would only be proof tending to show that he acted in good faith, and believed he had a cause of action against said Collins. To the charge as given on this point, and the refusal to charge as requested, the defendant excepted.

Ide & Stafford for plaintiff.

Gleed & Hunt for defendant.

ROWELL, J.—The declaration alleges that the defendant had no cause of action against Collins, and, as tending to show that he had, he offered to show that plaintiff had neither fenced its road nor built cattle-guards along where the heifer was killed, and that she got onto the track for want thereof. Although the defendant was not bound to show that he had a cause of action against Collins—for if he had probable cause to believe, and did believe, that he had, it was enough, and he might then lawfully sue and arrest Collins, as he did, even as against the plaintiff, though he did it with the motive alleged,—yet, if he saw fit to assume the burden of showing that he had a cause of action, it was competent for him to do so; for, as the greater includes the less, he would thereby be showing probable cause, and so the evidence should have been admitted if it bore on the question, as we think it did. FACTS.

When a railroad is completed and in running order, it is the statutory duty of the company to fence it with good and sufficient fences; and until its fences and cattle-guards are duly made, the corporation and its agents are made liable for the damage done by its agents or engines to cattle on the railroad, if occasioned by want of such fences and cattle-guards. R. L. §§ 3409–3412.

The question on this point is whether the word "agents," as first used in section 3412, includes engineers or not. The plaintiff contends that it does not, as they are the mere servants of the company, but embraces only those who, by lease or other contract, stand in place of the company and control and operate the road. But we think the word should be given a broader meaning, and was intended to embrace such servants as engineers, who are in fact agents of the company, and called so in section 3442, as are also firemen. AGENTS.

In Clement *v.* Canfield, 28 Vt. 302, it was contended that a

lessee of a railroad company was not of the class of agents referred to in the statute, but that those only are embraced who are under the control of the company, as engineers, conductors, and the like. In the opinion the chief justice seems to regard engineers and conductors as unquestionably embraced, and goes on to show that lessees are also embraced.

The New York statute of 1848 was precisely like ours in this respect, and received a similar construction in Snydam *v.* Moore, 8 Barb. 358. That was an action against an engineer and a fireman for killing a cow. The company had not erected fences nor made cattle-guards where the cow got onto the track, and the accident was nearly or quite inevitable, but the defendants were held liable. The court said that this neglect of the company had greatly increased the defendants' liability, but they were not bound to remain in its employment. That case is referred to approvingly in Corwin *v.* New York & E. R. Co., 13 N. Y. 50.

When this case was before the court on demurrer to the declaration (55 Vt. 570), it was held that there was nothing alleged to make the judgment in Hunt *v.* Collins an estoppel on this plaintiff. That judgment is now offered as evidence tending to show that Hunt had a cause of action against Collins. But, if that judgment is any evidence in this behalf against the plaintiff, it is conclusive evidence of probable cause for the suit in which it was rendered (Hathaway *v.* Allen, Brayt. 152; Reynolds *v.* Kennedy, 1 Wils. 232; Cloon *v.* Gerry, 13 Gray, 201); and, as nothing now appears in this case to make that judgment conclusive on the plaintiff that did not appear before, the former decision on this point must stand, for a decision once made in a case is final and conclusive in the case in which it is made.

If, before commencing suit against Collins, the defendant took competent legal advice on a full and correct statement of all the material facts known to him, or that he had reason to believe existed, and acted honestly upon it, believing he had a cause of action, it is a defence here, because it affords probable cause for that suit; and the jury should have been so instructed. Snow *v.* Allen, 1 Stark. 502; Bayley, J., in Ravenga *v.* Mackintosh, 2 Barn. & C. 693; Stone *v.* Swift, 4 Pick. 389; Stewart *v.* Sonneborn, 98 U. S. 187; s. c., 1 Amer. Lead. Cas. (4th ed.) 215; Bigelow Lead. Cas. Torts, 200; Cooley, Torts, 183.

Judgment reversed, and cause remanded.

SNYDER

v.

WABASH, ST. LOUIS AND PACIFIC R. Co., Appellant.

(86 *Missouri*, 618.)

A right of action arising from a tort to property is assignable under the code (overruling Wallen v. Railway, 74 Mo. 521).

APPEAL from Daviess circuit court,—Hon. JOHN C. HOWELL, Judge.

Affirmed.

W. H. Blodgett and *G. S. Grover* for appellant.

Edwin Silver and *W. D. Hamilton* for respondent.

NORTON, J.—The first question presented by the record in this case is, whether a cause of action arising out of defendant's failure to erect and maintain lawful fences along the sides of its road, whereby a hog of the value of eight dollars was killed, can be assigned so as to give the assignee a right to sue in his own name. This question was answered in the negative by this court in the case of Wallen *v.* The St. Louis, Iron Mountain & Southern Railway, 74 Mo. 521, when it was held that section 3462, Revised Statutes, forbids the assignment of a thing in an action not arising out of contract. In this case we are asked to reconsider the question and to recede from the doctrine announced in the case above cited. According to the authorities to which we have been cited, the test to be applied in determining the assignability of causes of action is whether the cause of action would survive and pass to the personal representatives of a decedent. If it would, it is transferable by the direct act of the parties. If it would not, it is not assignable. ASSIGNMENT OF TORT.

Mr. Pomeroy, in his work on Remedies and Remedial Rights (sec. 147), lays the rule down as follows: "It is fully established by a complete unanimity in the decisions, that causes of action which survive and pass to the personal representatives of a decedent as assets, or continue as liabilities against such representatives, are in general assignable. By the common law, causes of action arising out of contract, unless the contract, being still executory, was purely personal to the decedent, or unless the injury resulting from its breach consisted entirely of personal suffering, bodily or mental, of the decedent, did thus survive; while causes of action arising out of torts did not, in general, survive. The statutes in

most, if not all, the States have changed this ancient rule, and have greatly enlarged the class of things in action which survive. It is now the general American doctrine, that all causes of action arising from torts to property, real or personal—injuries to the estate, by which its value is diminished, do survive and go to the executor or administrator as assets in his hands. As a consequence, such things in action, although based upon a tort, are assignable." See also sections 146, 148, 149, 150.

That the cause of action in this case would have survived to the personal representatives of the owner of the hog alleged to have been killed by defendant cannot be questioned in view of section 96 of Revised Statutes, which provides that "for all wrongs done to the property, rights, or interests of another, for which an action might be maintained against the wrong-doer, such action may be brought by the person injured, . . . or after his death, by his executor or administrator in the same manner and with the like effect in all respects as actions founded on contract." It is further provided in section 97, that the above-quoted section shall not extend to actions for slander, libel, assault and battery, or false imprisonment, nor to actions on the case for injuries to the person of the plaintiff, or to the person of the testator or intestate of any executor or administrator.

It is claimed by defendant's counsel that the assignability of a thing in action, arising out of a tort for injury to real or personal property, is denied by section 3462, Revised Statutes, which is as follows: "Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in the next succeeding section; but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract." The last clause in the above section was added to it as an amendment in 1855, and took effect on the first day of May, 1856. At the time the amendment was adopted the code of New York contained a section in precisely the same words as are to be found in said section 3462; and previous to the adoption of the amendment, it was held by the court of appeals of New York, in the cases of McKee *v.* Judd, 2 Kernan, 622, and Zabriskie *v.* Smith, 3 Kernan, 322, that a cause of action which would survive to the personal representatives can be transferred and enforced in the name of an assignee. It follows from the ruling made in the case of Skouten *v.* Wood, 57 Mo. 380, that section 3462 was adopted with the construction given to it by the courts of New York. It is said in that case: "That the construction of the act given by the courts of the State or country in which it originated would be very persuasive, if not conclusive, evidence that our legislature in adopting it meant to adopt it as construed by the judicial authorities of the State where it originated." So in the case of Butler *v.* The New York & Erie R. Co. 22 Barb. 110, where a suit was brought by the as-

signee of a cause of action against the railroad company for negligently running over and killing a yoke of oxen, the court held that the action was maintainable in the name of the assignee, and in the disposition of the cause it is observed, "that the one hundred and eleventh section of the code requires that every action must be brought in the name of the real party in interest; but by an amendment of the section in 1851, it is declared 'that this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract.' Before this section was amended in 1851, by adding the above restriction, it was held that in the class of cases where the right of action for a tort affected the property of the party, the right of action was assignable, so as to enable the assignee, under section 111 of the code, to sue in his own name. This amendment to section 111 has been supposed by some as intended to restrict this right, and to establish the general principle that nothing but a cause of action growing out of contract could be assigned so as to give the assignee such an interest as would enable him to enforce his demands by civil action. I do not see how any such construction can be given to this amendment. It is true, it does not authorize the assignment of a thing in action not arising out of contract. Nor does it forbid such an assignment. The right rests precisely on the same footing as it did before, and an assignee takes precisely the same interest in the assignment of every species of demand as it did before the code. It follows, therefore, that if the demand was such as was capable of assignment before the code, so as to carry an equitable interest to the assignee, it is such a demand as will now pass by assignment so as to give the assignee a right of action therein."

The same doctrine is announced in the following case: Fried *v.* Railroad, 25 How. 285. The same rule has been announced in Wisconsin and Kansas, in both of which States a provision, worded in the exact language of sec. 3462, Revised Statutes, is to be found in their codes of practice. See McArthur *v.* Canal Co., 34 Wis. 152, 153. In the thirty-eighth section of Bliss on Code Pleading it is said: "The section of the statute requiring the action to be brought in the name of the real party at interest closes with this proviso: 'But this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract;' which can only be understood as guarding against the inference that the section authorizes the assignment of rights of action arising from torts, which were not before assignable. The matter is left as before, and the proviso seems to be without legal effect." Van Santvoord's Pleading, 111, is to the same effect. It was held by this court, in the case of Smith *v.* Kennett, 18 Mo. 154, that a right of action for the conversion of property may be assigned under the code so as to enable the assignee to sue in his own name.

The cases of Cable *et al. v.* R. & Dock Co., 21 Mo. 133, and

Burnett *v.* Crandall, 63 Mo. 416, to which we have been cited by defendant's counsel, have no bearing on the question in hand, as in both of them the question involved was whether it was permissible for a party to split his cause of action by assigning part of it, and it was simply held that he could not. In view of what has been said, we must answer the interrogatory propounded in the beginning of this opinion in the affirmative, and hold that the proviso added, by way of amendment, in 1855 to section 3462 neither forbade the assignment of causes of action arising in tort for such injuries to property as survived to the personal representative, nor authorized the assignment of such causes of action arising in tort which did not survive to such representative, but died with the person, and that, in so far as the opinion in the case of Wallen *v.* The St. Louis, Iron Mountain & Southern R., 74 Mo. 521, conflicts with what is here said, it is overruled.

We think the statement made is sufficient and that the case was fairly tried.

All concur, except Judge HENRY, who dissents.

HENRY, C.J. (dissenting).—In Smith *v.* Kennett, 18 Mo. 154, decided in 1853, it was held that a right of action for the conversion of personal property was assignable, and that the assignee might sue in his own name; but that a chose in action for injuries to the person was not assignable. The statute then in force provides that: "Every civil action must be prosecuted in the name of the real party at interest except as otherwise provided in the next succeeding section." And that next section excepted an administrator, a trustee of an express trust, and a person expressly authorized by statute to sue. In 1855, within two years after the decision above referred to, the statute was amended as follows, and so it has remained ever since: "Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in the next succeeding section; but this section shall not be deemed to authorize the assignment of a thing in action, not arising out of contract." What is the meaning of the last clause? It applies, whatever its meaning may be, to all causes of action not arising on contract, as well as those recognized as assignable in Smith *v.* Kennett, as to those based upon injury to the person, decided in that case to be non-assignable. It is manifest that the first clause of the section never was susceptible of a construction which would authorize the assignment of a right of action for personal injuries, much less the right of an assignee of such a thing in action to sue in his own name. Who that is capable of construing the simplest English sentence, knowing what was decided in Smith *v.* Kennett, would construe, as authorizing the assignment of a right of action not by law assignable, the requirement, "all actions shall be prosecuted in the name of the real party in interest"?

That section, before the amendment, only operated upon cases in which the right of action was then assignable, and if one as assignee had brought action, under the statute of 1849, for a personal injury to another, is it not too clear to admit of argument that he could not have sustained the action? The amendment, which is in effect a proviso, means that no chose in action, not arising out of contract, shall be assignable, or that a right of action not arising out of contract should not be prosecuted in the name of an assignee. It means one or the other, or it is a meaningless superfluity. I am not inclined to construe it as forbidding the assignment of things in action, recognized as assignable in Smith *v.* Kennett. Nor was it so held in Wallen *v.* Railroad, 74 Mo. 521. We must, if possible, give effect to the proviso, and not impute to the general assembly the use of language in a solemn enactment, an entire proviso, having no significance whatever. It is not one of those inaccuracies which sometimes occur in original bills, but the clause in question is an amendment to a section prescribing in whose name suits should be prosecuted, and it must be construed with reference to the general scope and purpose of the section. The first clause manifestly embraced all rights of action arising out of contracts, and all actions for torts then assignable: and if the intent and purpose of the proviso was merely to exclude from the operation of the first clause causes of action arising out of injuries to the person, which we have seen this court had before held were not included, the idea could have been expressed in fewer words than are contained in the amendment. Our view is strengthened by the fact that the amendment was adopted recently, after the decision in Smith *v.* Kennett, and by the additional consideration that assignments of rights of action for torts are of a champertous nature, and against public policy, as was held in Oliver *v.* Walsh, 6 Cal. 458; Young *v.* Ferguson, 1 Litt. (Ky.) 298; McGoon *v.* Ankeny, 11 Ill. 558; Dunklin *v.* Wilkins, 5 Ala. 200; Goodwyn *v.* Loyd, 8 Porter, 237; Overton *v.* Williston, 31 Pa. St. 155; Brown *v.* Bipscomb, 9 Port. 472; 4 Blackstone's Comm. 135.

Decisions of the court of New York have been cited which place a different construction upon the clause in question in their statute, but when the case of Wallen *v.* Railroad was decided, we were not aware that the courts of that State had placed a different construction upon their statute, and having correctly construed our own, I am not inclined to abandon that construction and adopt one which I think erroneous. I think the meaning of the statute is as above stated, and that, so interpreted, it is a wise and salutary law, preventing sharpers and champertors from roaming about buying up claims for damages to property at a heavy discount, and prosecuting suits for injuries which, but for their interference, might have been compromised. When Wallen *v.* Railroad, *supra*, was before us, those adjudications were not cited, nor were we aware

that such decisions had been rendered. The case of Wallen *v.* Railroad was followed in a subsequent case, and having twice announced what I am satisfied is the true construction of our statute, I think we should adhere to it, however we might have held in the first instance if our attention had been called to the decisions above referred to. The proviso in question is sheer nonsense, if it does not mean what we held that it meant, in the two cases heretofore decided by us, and to hold otherwise is to attribute to the general assembly which enacted it gross ignorance, and to eliminate from the statute an entire proviso adopted as an amendment.

LEPP
v.
ST. LOUIS, IRON MOUNTAIN AND SOUTHERN R. CO., Appellant.

(87 *Missouri*, 189.)

In an action against a railroad company for double damages for killing stock, proof that the animal was killed at a point a quarter of a mile from the depot, beyond the switch limits, where the road was fenced on one side, but not on the other, is, *prima facie*, sufficient to show that the killing did not occur within the limits of an incorporated town, or at a public crossing.

It need not be shown by direct evidence where the animal strayed upon the railroad track. Proof that it was killed at a point where there was no fence, but where the company was in duty bound to fence, is sufficient to take the case to the jury.

APPEAL from Jefferson circuit court,—HON. JOHN L. THOMAS, J.
Affirmed.
Geo. H. Benton for appellant.
J. W. Pipkin for respondent.

BLACK, J.—Suit for double damages under section 809, Revised Statutes, 1879, for killing a cow. The suit was commenced in a justice's court. On trial in the circuit court the evidence showed
FACTS. that the railroad, and its parallel switch, run north and south, at Vineland station. The switch extended both ways from the depot. The cow was thrown from the track by the cars at a point about a quarter of a mile south of the depot, and thirty to forty yards south of the southern end of the switch. She was found with one leg broken at that point, and from twenty to thirty yards west of the railroad. There was a board fence at this point, on the east side of the road, a half a mile in length, but at what point it began on the north is not shown. On the west side of the road,

where the cow was thrown off, there is no fence. Vineland is a small place, and the buildings are south and east of the depot. One witness says: "There was a sign where she hit the ground; don't think there was any blood there; there was no sign there except where she scrambled off; the mark I saw was toward the south." Plaintiff lived, or there is evidence tending to show he lived, thirty-five or forty yards south of the depot. There is evidence of one house on the west side of the depot.

At the request of the plaintiff the court instructed the jury "that if they believe, from the evidence in this cause, that the cow in question strayed upon defendant's track in Valle township, Jefferson county, Missouri, at a point where the railroad runs along or by unenclosed fields, and where there was no road crossing, or depot, or switch, and where there was no fence on one side of said road, and that said cow strayed upon said track because there was no fence on one side thereof, and was there killed by defendant's cars, then you will find the issues for the plaintiff."

The court overruled a demurrer to the evidence, and refused to give, at the request of the defendant, the following instruction: "If the jury believe from the evidence that the cow in question got on the track at, or near, the residence of the plaintiff, in Vineland, and that it was killed in consequence of going on the track, then they will find for the defendant."

It is contended by the defendant, that there is no evidence that the cow did not stray upon the track in a town or city, and if in error as to that, then the refused instruction should have been given, and thereby submit that question to the jury. Railroads are not required to fence their roads in cities and towns, nor at public crossings and depot grounds. Morris *v.* Railroad, 79 Mo. 368. A complaint that cattle came upon the track, and were run over and killed, at a point on the road where it passed through unenclosed lands, and at a point on the road where was no public or private crossing, sufficiently negatives the possibility that the killing took place in a town. Rozzelle *v.* Railroad, 79 Mo. 349. So proof of like facts should have accorded to it like results, *prima facie*, at least. The evidence in this case shows that the animal was killed at a point where the road was fenced on the one side, but not on the other, and at a point even beyond the switch limits, and a quarter of a mile from the depot. The fact that the railroad was fenced at that point on the one side negatives the notion of a public crossing at that place. Indeed, the whole of the evidence negatives the idea that there was any part of the village there, if even a village or town there was at the station. No claim is made that there was an incorporated village even at the station.

COMPLAINT.

It is true there is no direct evidence as to where the cow did stray on the track, but the fact that she got killed on the road at the point in question, and that there were signs there,

EVIDENCE.

and that this was at a place, too, where the road was in duty bound to fence, entitled the case to go to the jury. Such questions are often not susceptible of direct proof, and circumstances may be resorted to. Walthers *v.* Railroad, 78 Mo. 617; Gee *v.* Railroad, 80 Mo. 283. If the refused instruction had been prepared so as to show that the cow strayed on the track at the town, and also that she was killed by reason of getting on the track at that place, it might have been given, but as it is, the judgment should be affirmed. All concur.

MILBURN

v.

KANSAS CITY, ST. JOS. AND COUNCIL BLUFFS R. Co., Appt.

(86 *Missouri*, 104.)

Where, in an action founded on the negligence of defendant, plaintiff's evidence shows that his own negligence directly contributed to produce the injury, he disproves the case alleged and cannot recover.

In an action against a railroad for the negligent killing of plaintiff's cows by its trains, on a public crossing, mere proof that the speed of the trains was not checked, and that the cattle could have been seen eighty rods off, does not establish defendant's negligence.

Where the owner of cattle sees them in danger on a railroad track, and can, by reasonable exertion, get them off, he is bound to do so, and if he does not, and they are injured by a passing train, he cannot recover. The owner, in such case, has no right to rely upon the performance of the duty which the law imposes on the company of giving warning signals.

APPEAL from Buchanan circuit court,—Hon. W. H. SHERMAN, Judge.

Reversed.

Strong & Mosman for appellant.

A. H. Vories for respondent.

HENRY, C.J.—This action is to recover the value of two cows killed by defendant's train of cars at a public crossing. Plaintiff had judgment, from which defendant has appealed. The petition FACTS. contains two counts, one for killing a cow on the fourteenth, and the other for killing a cow on the twenty-third, of June, 1881. The killing of the cow on the fourteenth occurred about sundown, and the other in the forenoon of the twenty-third, about 9 o'clock. Both cows were killed by regular passenger trains.

The evidence for plaintiff tended to prove that the cows could

have been seen by one on the engine, from the whistling-post south of the crossing, and at any point between that post and the crossing, a distance of eighty rods. That both trains were going north and running very fast, and in neither instance was the speed of the train checked. Plaintiff also testified that on the fourteenth of June, 1881, he walked into his field and saw the cow standing on the crossing two hundred yards from him. That he started off across his field, and went twenty or thirty rods and came back to the place he started from, and the cow was still standing on the crossing. This was about 5 or 6 o'clock. That when he got back to the place he started from he heard the train, which was the regular evening passenger train. He testified, as to the cow killed on the twenty-third, that he was about two hundred yards from the crossing, and saw the cow on it, and a few minutes after saw the train coming north, about one half mile off, about 9 o'clock, A. M. That he stood and looked at the cow. That his boys were ploughing about half way between him and the cow. His son testified that he was ploughing in the field the day the first cow was killed, and was one hundred yards from her. Saw her standing on the track for nearly a half-hour before the train struck her. That he was standing still when the train struck her. That his father's cattle habitually stood on the crossing when they came home at night.

Gharkey, for plaintiff, testified that he was at Milburn's house when the cow was killed on the fourteenth; that plaintiff was at the house just before it occurred. That witness spoke of the cow being on the crossing in plaintiff's hearing. He, plaintiff, then went north into the field from the house, to a point nearly west of the crossing. "It was a good little bit after that till the cow was killed."

Defendant asked an instruction in the nature of a demurrer to the evidence, which was overruled. This is a peculiar case. The plaintiff's cattle habitually stood upon this crossing in the evening. He saw both cows on the crossing before they were killed. When the first one was killed his attention was called to the fact that she was on the crossing a little before the train going north was due. He was then at his house in a southwesterly direction from the crossing, and instead of going toward the crossing he went north to a point west of the crossing. His own testimony shows that if he had made such an effort as a prudent man, desiring to save the cow, would have made, he could have driven her from the crossing before the train reached it. He made no effort whatever to get her off of the track. From the point where he first saw the cow he walked a distance, in going and returning to it, greater than the distance the cow was from that point, and when he returned she was still on the crossing. This is his own testimony, and he states no emergency to prevent his going

DEMURRER TO EVIDENCE.

to the cow. With respect to the second cow he was two hundred yards from her when he first saw her on the crossing, and a few minutes after he heard the train coming. His boys were midway betwen him and the cow, and he neither made any effort to drive her off nor ordered his boys to do so, although he and they knew that the train was then nearly due at that point.

CONTRIBUTORY NEGLIGENCE.

Contributory negligence was not pleaded, but when the plaintiff, in making out his case, clearly establishes that the injury he complains of was as much the result of his own negligence as that of the party of whose negligence he complains, can he recover? The ground of his complaint is that the injury was occasioned by the negligence of the defendant, and if his proof shows that his own negligence directly contributes to produce the injury, he disproves the case alleged. Buesching *v.* Gas Co., 73 Mo. 229. If the cows were killed intentionally a different question would be presented, but while the petition alleges that they were killed carelessly, recklessly, and wilfully, there is no evidence of a wilful killing, and three members of the court, SHERWOOD and BLACK, JJ., and myself, are of the opinion that plaintiff failed to make proof of negligence against the company. For aught that appears the whistle was sounded and the bell rung on the engine to frighten the cattle from the track. Plaintiff offered no proof that this statutory duty was not performed by the train-men. If they failed to make use of those signals of warning, it was negligence, but it was for plaintiff to prove such negligence. It was not a fact peculiarly within the knowledge of the train-men. Proof that the speed of the train was not checked, and that the cattle could have been seen eighty rods off, does not establish negligence. It is not shown that they were seen, or, if not, that it was owing to the negligence of the train-men. But, be this as it may, and even conceding that there was ample proof of negligence against the defendant, yet it is but negligence against negligence, and where both parties are guilty of negligence contributing directly to produce the injury, there can be no recovery.

Apart from the mere pecuniary interests involved, did the plaintiff owe no duty to the men, women, and children crowded in passenger cars of a railroad train, which was in danger of being wrecked by running over cattle or other obstructions on the road? Is such conduct of a citizen, as that of which plaintiff proved himself guilty on two occasions, to receive the sanction of the courts? How would the case look if the train had been wrecked, and passengers killed or seriously injured, by running over plaintiff's cows, and he had sued for damages? How much less culpable is he who sees an obstruction on a railroad track, which he could easily remove, but will not, knowing that a train is approaching which may be wrecked by running upon it, than he who placed it there? In law the former is not guilty at all, while he who placed

the obstruction on the track is a felon; but in the forum of conscience there is but a shade of difference between their guilt. We are not to be understood as holding it to be the duty of owners of cattle either to confine them, or to keep watch over them to prevent them from going upon railroad tracks, but only that when they see their cattle in danger on the track, and can, by reasonable exertions, get them off the track, they are bound to do so, and have no right to rely upon the performance of the duty which the law imposes upon the company to give warning signals. We have held repeatedly that a human being has no right to rely upon the performance of that duty by train-men in passing over a public crossing, but must exercise care in doing so, and, if himself negligent, cannot recover damages for an injury he may sustain from a passing train.

The instructions as to plaintiff's contributory negligence very fairly submitted that question to the jury, but the error was in submitting it at all. The case should have been withdrawn from them at the close of plaintiff's testimony.

The judgment is reversed. All concur except NORTON, J., who dissents.

COLEMAN

v.

FLINT and PERE MARQUETTE R. Co., Appellant.

(*Advance Case, Michigan. January* 18, 1887.)

The facts, that a road was never opened and worked by the authorities inside the line of plaintiff's fence, but outside of it only; that the public use and travel have also been outside of such fence; that the plaintiff for over thirty years has cultivated and held the premises as his private property, subject to no easement of the public, are sufficient to rebut any presumption of any donation or dedication of the same to the public, and conclusive evidence of an intention to restrict the road to the space outside of his fence.

The legislature cannot alter or change the vested rights of the plaintiff in the premises, nor take his land for public use without compensation and without his consent.

Where a railroad track crosses a highway diagonally, and the company, in fencing its right of way, leaves a jog or space between the termination of its fence and the fence of the adjacent owner, it violates its duty in fencing its right of way; and where the horse of plaintiff escaped by reason of a defective fencing of that space and went upon the track of defendant, where it was killed by collisions with its cars, the company is liable.

ERROR to the Monroe circuit court to review a judgment rendered against defendant in an action for damages for killing plain-

tiff's horse, which escaped from plaintiff's premises by reason of the neglect of defendant to fence its track. Affirmed.

The facts are stated in the opinion.

William L. Webber for defendant, appellant.

John Davis and *E. Willard* for plaintiff, appellee.

MORSE, J.—The plaintiff sues for the value of a horse killed by the cars upon the track of defendant. The action was brought in the justice's court, and appealed therefrom to the circuit, where, upon a trial before the court without a jury, the plaintiff recovered.

FACTS.

The horse escaped upon the track from the premises of plaintiff through a defective fence. The plaintiff claims it was the duty of the defendant to erect and maintain this fence, which the defendant denies. This is the sole point to be determined.

From the findings of fact by the circuit judge, Hon. Chauncey Joslyn, it appears that the plaintiff keeps and cultivates a farm in the township of Frenchtown, in Monroe County, through which the defendant's railroad track and right of way extend. On the aforesaid premises of the plaintiff the track of the defendant's road crosses a highway; it does not cross at right angles, but diagonally.

When the defendant fenced the track, it acted upon the assumption that the highway was 4 rods in width, and on each side of the highway built fences along a line 2 rods distant from the centre line of said highway, as surveyed to the cattle-guards upon the track. The highway as used, however, was not 4 rods wide, and the plaintiff's road fence was only 15 feet and two inches from the centre of the highway as travelled and surveyed. This left a jog or break between the highway fence as built by the defendant, and the road fence of the plaintiff, of 25.5 feet. The plaintiff built a pole fence extending from the corner of his fence across this distance to the fence of the railroad company. The defendant assumed that it was no part of its duty under the law to maintain a fence across this space, and the plaintiff therefore kept it up until the killing of the horse. The horse escaped through this pole fence, and was killed on the track between the cattle-guards.

The highway in question was laid out in 1832 by two commissioners of Frenchtown, but the records as found in the town clerk's office are defective and show no jurisdiction obtained by said commissioners. But the highway has been used and travelled for over forty years. The centre line appears by such records to have been surveyed, which is now on file in the clerk's office. This centre line was used as the guide of the defendant in erecting its highway fence.

Where the railroad crosses the highway is a turnpike, which is built almost exactly upon the centre line of the highway as surveyed in 1832. The highway is not 4 rods wide anywhere between

fences along its whole route. The land of the plaintiff has been fenced to the highway, as it was at the time of the killing of the horse, for a period of thirty years or more, and the pole fence was built by the plaintiff about fifteen years ago.

The defendant contends that under the statute law of this State all public roads have been required to be 4 rods wide since 1827 to the present time, excepting about one year from 1857 to 1858; and this law applies to highways that have become such by user, as well as to those regularly laid out under the statute; and that the road fence of the plaintiff must be considered as an encroachment upon the highway, and that he could not acquire the land within the 4-rod limit of the highway by user as against the public.

The plaintiff claims that the highway was not regularly laid out, and is a public road by user only; and that it exists as such highway just so far as it has been used, and can extend no farther than the user.

It makes but little difference, practically, as regards the rights of the contending parties, whether the highway in question was regularly laid out under the statute or acquired by user.

HOW HIGHWAY WAS MADE PUBLIC.

If regularly laid out in the first instance, it appears very clearly from the finding of the circuit judge, who finds the facts as stated by a witness (S. M. Bartlett) that the land included within the plaintiff's fence has never been opened and worked as a highway; and the plaintiff, by long occupation, has acquired the title to such land as against the public. It has been settled in this State that a highway can be partially discontinued by non-user, and that it stands, as against long possession, no better than any other property. Gregory *v.* Knight, 50 Mich. 61–64.

On the other hand, if it is a highway by user only, it can extend no farther than it has been used. Wayne County *v.* Miller, 31 Mich. 447–449; Pratt *v.* Lewis, 39 Mich. 7–12; McKay *v.* Doty, 30 N. W. Rep. 591, 592.

We are referred by the counsel for defendant to How. Stat., § 1315 of which provides as follows: "All highways regularly established in pursuance of existing laws, all roads that shall have been used as such for ten years or more, whether any record or other proof exists that they were ever established as highways or not, and all roads which have been or which may hereafter be laid out and not recorded, and which shall have been used eight years or more, shall be deemed public highways, subject to be altered or discontinued according to the provisions of this act. All highways that are or that may become such by time and use shall be 4 rods in width, and where they are situated on section or quarter-section lines, such lines shall be the centre of such roads, and the land belonging to such roads shall be 2 rods in width on each side of such

lines,"—in support of the proposition that this highway, if acquired by user, must be 4 rods wide.

But the clause in the statute making such roads 4 rods wide was adopted in 1881, after the highway in question had become a public road by user.

It was held in Bumpus *v.* Miller, 4 Mich. 159–163, that a highway acquired by user under the provisions of the constitution would be 4 rods in width, unless the dedication or donation implied by the user was expressly or impliedly restricted by the owner.

In this case the fact that the road was never opened and worked by the authorities inside of the line of the plaintiff's fence, but outside of it; that the public use and travel have also been outside of such fence, the plaintiff for over thirty years cultivating and holding the premises as his private property and subject to no easement of the public,—is sufficient to rebut any presumption of any donation or dedication of the same to the public, and conclusive evidence of an intention to restrict the road to the space outside of his fence.

The legislature, in my opinion, in 1881, could not alter or change the vested rights of the plaintiff in the premises. It would be taking the land of the plaintiff without compensation for public use, and without his consent. McKay *v.* Doty, 6 West. Rep. 372.

The line of the highway must be considered to be the fence of the plaintiff. It was, therefore, and is, the duty of the defendant, under the law, to erect and maintain a proper fence along the line of the pole fence through which the horse escaped.

The judgment of the court below is affirmed, with costs.

The other justices concurred.

STANLEY

v.

MISSOURI PACIFIC R. Co., Appellant.

(84 *Missouri*, 625.)

A statement against a railroad company for double damages for killing plaintiff's hogs, which alleges that they strayed upon defendant's road at a place where it is required by law to erect and maintain lawful fences on the sides of its road, which it failed to do, by reason of which said hogs were run over and killed by defendant's cars, although defective in not averring that the point was not at a public or private crossing, nor within the limits of an incorporated town or city, is sufficient after verdict, when the deficiency has been supplied by the evidence.

In a county where the law restraining swine from running at large is in

force, a railroad company is relieved from the duty of fencing against them merely to prevent their getting upon its track; but where its road passes through, along, or adjoining inclosed or cultivated fields it is under legal obligation to erect and maintain lawful fences on the sides of its roads, and is liable in double damages for injury to swine by its engines and cars where they entered upon its track from such fields, because of its failure to erect and maintain lawful fences along the sides of its road.

APPEAL from Cass circuit court—Hon. N. M. GIVAN, Judge.
Affirmed.
Robert Adams and *George N. Bowles* for appellant.
Comingo & Slover for respondent.

DE ARMOND, C.—Plaintiff's statement, filed with a justice of the peace of a proper township, contains, among other things, the following: "That on or about the eighth day of August, FACTS. 1881, said defendant owned and was operating a railroad through Pleasant Hill township, Cass County, Missouri, and while so operating the same at the time above stated, at a place on said road in said Pleasant Hill township, where it is required by law to erect and maintain lawful fences on the sides of its road, but had failed to do so, by reason of which plaintiff's hogs strayed into defendant's railroad track, and said defendant, by its agents and employees, ran an engine and train of cars over and upon five hogs, the same being property of plaintiff, and of the value of fifty dollars, by reason of which said hogs were killed, and the plaintiff damaged in the sum of fifty dollars, for which he asks judgment, and that said damages be doubled," etc.

Afterwards, in the circuit court, the case was tried on the statment filed with the justice, and the agreed facts, to wit: "That defendant's train, on the first of August, 1881, ran over and killed five of plaintiff's hogs, of the value of fifty dollars. That said hogs got on defendant's track from plaintiff's land; that it was not woodland; that defendant's road was fenced at the point where plaintiff's hogs got on the track, and where they were killed; that it was not on a public crossing, nor a private crossing, nor in the corporate limits of an incorporated town or city; that the land where the hogs got on defendant's tracks was not laid out in town lots; that the accident did not happen within the switch lines of a station; that the stock got from a field of plaintiff's on the line of defendant's road; that said field was, at the time of the accident, enclosed on the east, west, and north sides by a good fence, but that plaintiff had not built a fence on the south side of said field next the line of defendant's road; that defendants had a fence along the line of its road at said point sufficient to turn cattle and horses; that plaintiff's hogs got on the track by passing under said fence at a point where it crosses a washout or ditch, of a depth that was sufficient to permit the hogs to pass under said fence, and that

the accident occurred in Pleasant Hill township, Cass County, Missouri. It is further admitted that the act of the legislature of Missouri, known as the Hog Law, had been adopted by a vote of the people of said county prior to the time of said accident and was then in force."

Plaintiff recovered judgment for $100, and defendant appealed.

I. In the motion in arrest (which, as well a motion for a new trial, was overruled), the statement is attacked as not stating facts sufficient to constitute a cause of action.

SUFFICIENCY OF STATEMENT.

On argument here the objection is made specific, and attention is directed to the fact that it is not averred that the point where the hogs got into the railroad track was not at a public or private crossing nor within the limits of an incorporated town or city; and it is argued that the statement contains no allegations from which these facts may be inferred. The statement is defective, but after verdict, when the admitted facts have supplied the deficiency, the objection was properly disregarded. Edwards *v.* R. Co., 74 Mo. 177; Kronski *v.* M. P. R. Co., 77 Mo. 362; Perriquez *v.* Railroad, 78 Mo. 91; Asher *v.* St. L., I. M. & S. R., 79 Mo. 432.

II. The hog law (chap. 159, R. S.) being, according to agreement of parties, in force in Cass county when plaintiff's hogs were killed, is the defendant liable for double damages, single damages, or not at all? Certain Kansas cases are cited by appellant's counsel. Mrs. Lea owned a cow which she was required by law to "confine." The railroad company was required by law to fence. Mrs. Lea suffered her cow to roam abroad. The company did not fence its road. The cow strolled onto the unfenced road and was run over by the cars and killed. The court decided that an action for killing the cow could not be maintained, both parties being violators of the law, and between wrong-doers the courts will not decide. Railroad Co. *v.* Lea, 20 Kas. 353. Again, Landis owned 160 acres of land, and through it the railroad company had a right of way and ran their trains. The legal duty of confining one's animals and fencing one's railroad was as in the case just cited. Landis had a lawful fence enclosing his quarter section. The railroad through the land was not fenced. Within this enclosure, on the unfenced railroad, Landis' mule was killed by the cars. The court decided that Landis could not recover for the injury. The argument is that Landis was bound to confine his mule; that the mule was confined as to all the world except the railroad company, which had and used the right of way strip through the enclosure. That as to the company the mule was not confined, and Landis' case was not helped by the fact that the company had disregarded its statutory duty to fence. Railroad Co. *v.* Landis, 24 Kas. 406. Another case, Railroad *v.* Mossman, 30 Kansas, 336, decides that "confined" and

DAMAGES.

"prohibited from running at large" mean substantially the same thing.

Our own court, in Gorman *v.* Pacific R., 26 Mo. 450, says: "The motive of the law in requiring railroads to be fenced is not the security of cattle only, but chiefly the preservation of the persons and lives of the passengers, which would be greatly endangered if cattle were not restrained from wandering upon them." At another place in the same opinion it is observed: "As proprietor the company is under no greater obligation to fence its road than any other owner of land." In Clark's Admr. *v.* H. & St. Jo. R. Co., 36 Mo. 202, it is declared that the requirement is to fence in the railroads and fence out the animals, not to "enclose the farms or fields of private land-owners for their benefit, nor for any other purpose." By amendment of the law, double damages have long been allowed, not only for injuries to animals on the railroads, but also by reason of animals escaping from or coming upon the premises of private land-owners, from the failure to fence as required. The change wrought is well shown in Silver *v.* K. C., St. L. & C. R., 78 Mo. 528. The twofold object of the law is accomplished in the protection of the travelling public, and of the adjacent land-owner. The railroad fence is now designed to protect, among other things, the fields and farms which it serves, in part, to enclose. The land-owner has the right to utilize it in enclosing his premises. Then follows his further right to insist that it be erected and maintained according to law, that his lands, improvements, and animals shall be protected by lawful and sufficient fences. Berry *v.* Railroad, 65 Mo. 172; Harrington *v.* C., R. I. & P. R., 71 Mo. 384. By virtue of this hog law, "it shall not be lawful for swine . . . to run at large off the premises and outside the inclosure of the owner." "It shall not be necessary for any person to fence against swine." R. S., secs. 7411, 7418. From this it would seem to follow that in a county where the hog law is in force, a railroad company is relieved from the duty of fencing against swine merely to prevent their getting upon its track; as where the road passes through "unenclosed lands." But the legal obligation "to erect and maintain lawful fences on the sides of the road where the same passes through, along, or adjoining enclosed or cultivated fields," remains the same everywhere in the State. The general law prescribes what are lawful fences. The general statute, too, requires these lawful fences to be built and maintained for a double purpose, as we have seen; it devotes them to the purpose of enclosing the fields as well as the railroad strip. They are required, among other things, to prevent damages resulting "by reason of any horses, cattle, mules, or other animals escaping from or coming upon such lands, fields, or enclosures."

Stanley was required by the hog law to restrain his swine from running at large off his premises or outside of his enclosure. The

railroad company was required by the general law to erect and maintain a lawful fence on the side of its road adjoining Stanley's field. Stanley had good and sufficient fences on the north, east, and west sides of this field. On the south side the railroad fence completed the enclosure. But this railroad fence was not a lawful fence, under the general statute. A lawful fence was required to keep the hogs upon Stanley's premises and within his enclosures, where it was his right and duty to keep them. He was entitled to the protection of such a fence upon the railroad side of his field. As the direct result of the company's "failure to construct and maintain such fence," his hogs were killed, and the owner thereby damaged. Referring again to the Kansas cases, I do not doubt the correctness of the proposition that the courts will not decide between wrong-doers as to who shall bear, or how they shall divide, the burden of the violated law. But the doctrine, I think, does not apply in cases such as this. Stanley did confine his hogs, but one enclosing fence was insufficient, in fact, and under the general law, that fence it was the duty of the railroad company to maintain, as the general law required. There is but one wrong-doer in the case, and that one must respond in double damages, because by the statute it is so provided.

All concur in the opinion that the judgment should be affirmed.

MILLER, Respondent,

v.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN R. Co., Appellant.

(*Advance Case, Missouri. December* 20, 1886.)

A railroad company is responsible for the destruction of crops by cattle, where the fences of the land-owner along its line of road were destroyed by fire communicated from its track by reason of its engine scattering fire upon dry grass, which had been suffered by the company to accumulate along its track through its negligence.

Where the evidence showed that it was a good stock range around the plaintiff's field, and that many horses, cattle, and hogs came into the field after the fence was burned, and, in spite of all efforts to keep them out, destroyed the crop before the fence could be rebuilt, it was a natural result, as much to be expected as that the fire would destroy the fence in the first instance.

It is not necessary to a defendant's liability, after his negligence has been established, to show, in addition thereto, that the consequences of his negligence could have been foreseen by him; it is sufficient if the injuries are the natural, though not the necessary or inevitable, result of the negligent fault,

—such injuries as are likely in ordinary circumstances to ensue from the act or omission in question.

A *prima facie* case of negligence on the part of a railway company to provide suitable mechanical contrivances to prevent the escape of fire is made out when it is shown that fire escaped from such engine and caused the fire in question, thus throwing the burden of proof on the defendant to establish that, notwithstanding the fire did escape, the best mechanical contrivances were supplied by defendant to prevent such an occurrence.

APPEAL from a judgment of the circuit court for the county of Stoddard, rendered against the defendant in an action for damages for destruction of plaintiff's crops caused by fire negligently set out and communicating with plaintiff's fence, and destroying the same, whereupon cattle entered and destroyed plaintiff's crops. Affirmed.

The facts are stated in the opinion.

T. J. Portis for appellant.

D. H. McIntyre for respondent.

SHERWOOD, J.—The petition in this cause, so far as necessary to copy it, is as follows:

"Plaintiff further states that the defendant was the owner and had possession and control of the premises adjacent to the premises of this plaintiff, and used and occupied the same in running and operating their said road. Plaintiff further states that defendant criminally and negligently permitted and allowed the premises so owned and occupied by themselves, to and adjacent to plaintiff's, to grow up in grass, and permitted the same to dry and become inflammable matter. Plaintiff further states that on said 1st day of September, 1881, at the county of Stoddard and FACTS. State of Missouri, and at the time defendant was engaged in running and operating said railroad, the defendant did, by its agents, servants, and employees, while running a railroad engine of defendant's, by means of fire as aforesaid, between the town of Poplar Bluff and to and beyond the town of Dudley, in Stodddard County, Mo., set fire to the fence of plaintiff and the inflammable material permitted by defendant to grow and become inflammable upon the premises of defendant at a place near the said town of Dudley, and at a point where the premises of said defendant joined to those of this plaintiff, by sparks of fire escaping from the engine of defendant, run and operated by its agents and servants, and by reason of the neglect and failure of defendant to equip said engine with mechanical contrivances employed and constructed to prevent the escape of fire. Plaintiff further states that by reason of the fire so kindled, and by reason of the neglect of defendant to remove the said inflammable matter at the point or place aforesaid, and by reason that the defendant failed to prevent the scattering of fire from its engine by the use of mechanical contrivances to prevent the escape of fire, his fencing, of the value of $100, that enclosed the above-described premises, was set on fire by the defendant and

burned up, and thereby leaving his crop exposed and unprotected from destruction by cattle and hogs and other stock. Plaintiff further states that there was at the time standing and growing upon said premises 40 acres of corn of the value of $350, all of which corn and property of plaintiff was by reason of the destruction of said fencing, caused by the neglect of defendant aforesaid, injured and destroyed by cattle, hogs, and other stock. Wherefore plaintiff prays judgment against said defendant in the sum of $450, and for his costs of suit."

It will be observed that the petition, in substance, charges that the damage done to plaintiff's property resulted from the escape of fire, which escaped by reason of the neglect of the defendant to provide suitable mechanical contrivances to prevent the scattering of fire by its engine, and by reason of the neglect of the defendant to remove the dry grass on its right of way.

Under the rulings of this court a *prima facie* case of negligence on the part of a railway company to provide suitable mechanical contrivances to prevent the escape of fire is made out. when it is shown that fire escaped from such engine and caused the fire in question, thus throwing the onus on the defendant to establish that notwithstanding that fire did escape, as it sometimes will, the best mechanical contrivances were supplied by defendant to prevent such an occurrence. Fitch *v.* Pac. R., 45 Mo. 322; Bedford *v.* Han., etc., R., 46 Mo. 456; Clemens *v.* Han., etc., R., 53 Mo. 366; Coates *v.* M. K. & T. R., 61 Mo. 38.

ONUS.

In the case at bar the proof is direct that a train of defendant passed "strewing fire all along;" that the fire thus escaping set fire to the grass, and that to the fence, and in some places the fire was not more than two minutes in reaching the fence; that the grass was very dry and burned almost like powder, very fast. There was no evidence offered by defendant showing the use of proper appliances to prevent the escape of fire.

The instructions given on behalf of plaintiff, barring some verbal criticism, put the case fairly enough to the jury. Indeed, it may be said that the plaintiff might well have insisted upon a more favorable instruction; for, under the one given, any negligence of the plaintiff, however slight, whether relating to protecting the premises from fire, or from the depredations of stock which caused the destruction of the crop of corn, would have precluded a recovery by him. If the defendant desired a more specific instruction on the subject of plaintiff's negligence, one should have been asked, but this was not done.

The chief point of objection, however, which the defendant takes, is to the doctrine that the company is responsible for the destruction of the crop by cattle, etc. It was in evidence that it was a good stock range around plaintiff's field, and that many horses, cattle, and hogs came into the field

DESTRUCTION OF CROPS.

after the fence was burned, and, in spite of all efforts to keep them out, destroyed the crop before the fence could be rebuilt. The destruction of the crop of corn by the stock ranging round the field after the barrier of the fence was removed by fire was just as natural a result, and one to be as much expected, as that the fire would destroy the fence in the first instance. Had the fire destroyed the crop of corn, no one would doubt that under our rulings the plaintiff could recover.

The case is the same in principle where the immediate result of the fire is to remove the only intervening obstacle between the stock and the crop, as where the natural result of such removal is as disclosed by the evidence here. No one who has ever lived in the country would need to have this view of the subject pressed upon his attention; and it is sufficient if the injury is the natural, though not the necessary or inevitable, result of the negligent fault. Shearm. & R. Neg. § 596.

In Kellogg *v.* Ohio. etc., R., 26 Wis. 223, it has been ruled in a very able opinion by Dixon, Ch. J., that the maxim *causa proxima*, etc., includes not only liability for all natural and probable injuries having origin in the wrongful act or omission, but such injuries as are likely in ordinary circumstances to ensue from the act or omission in question; and it has been ruled in England that it is not necessary to a defendant's liability, after you have established negligence, to show in addition thereto that the consequences of the negligence could have been foreseen by him, Smith *v.* London, etc., R., L. R. 6 C. P. 21; and to the same effect is a case in Masschusetts. Higgins *v.* Dewey, 107 Mass. 494, cited Whart. Neg. § 20.

The fifth instruction asked for defendant has already been disposed of by remarks made as to the *prima facie* case made by plaintiff by showing the escape of fire.

The fourth instruction asked on behalf of defendant was properly refused because of no evidence on which to base it. From all that appears in evidence, the loss of the rails was the loss of the plaintiff. As to the other instructions asked on the part of the defendant, *i.e.*, 2 and 3, so far as proper to be given they were embraced in the instruction given at plaintiff's instance; and there was evidence sufficient to go to the jury tending to show that plaintiff used all proper diligence in keeping his crop from being destroyed, and that, owing to the length of fence destroyed, it was scarcely within the bounds of ordinary human achievement, at least without running to an expense more than the crop probably would have been worth, to have guarded it until the fence could have been prepared. Tested by the authorities cited, the case was tried on the correct theory, and the judgment is accordingly affirmed.

All concur.

JOYNER

v.

SOUTH CAROLINA R. Co.

(*Advance Case, South Carolina. January* 4, 1887.)

The presumption of negligence established by the rule in Danner's Case, 4 Rich. 330, against railroad companies in actions for damages for the killing of stock on the track, upon proof by plaintiffs of their ownership and of the killing, is not restricted to cases where the defendant produces no testimony, and is not *ipso facto* destroyed by the introduction by the company of testimony purporting to show the attendant facts and circumstances of the killing so as to throw the onus upon the plaintiff of proving negligence from the facts brought to light by such testimony, whether exculpatory or not, but the presumption continues to have a controlling force until overthrown by defendant's making out affirmatively a case of due care or unavoidable accident. MCIVER, J., dissenting.

Where the plaintiff proves ownership and the killing, and rests his case under the rule in Danner's Case, and defendant produces no evidence, but moves for a nonsuit, such motion is rightly denied.

An instruction that if the train was running at lawful speed, and had the customary appliances and force of train-men, and the stock, when it was or might have been seen by the engineer with due care, was so close that the train could not be stopped in time to avoid striking it, then the plaintiff could not recover, is correct.

An instruction that much less care is required of railroad companies in providing against stock on its track since the passage of the stock law requiring stock to be inclosed, is correct.

Gen. St. S. Car. § 1499, providing that good and sufficient brakes shall be attached to every passenger car, and to all freight cars except four-wheeled freight cars, and also upon every passenger train trusty and skilful brakemen, at least one to every two cars, and upon every freight train one to the last car of such train, does not apply to a mixed train of freight and passenger cars.

APPEAL from the common pleas, Richmond county.

Action against a railroad company for damages for the killing of stock. Verdict for defendant. Both parties appeal.

Allen J. Green for plaintiff and appellant.

John C. Haskell for defendant and respondent.

SIMPSON, C.J.—The action below was brought to recover the value of two mules alleged to have been killed by a train of the defendant. The case was heard before Judge Kershaw and a jury in July, 1885, the defendant obtaining the verdict. Both sides have appealed,—the defendant because his honor the presiding judge refused a motion for a nonsuit made at the close of the plaintiff's testimony; the plaintiff on several exceptions alleging error in the charge, and in certain refusals to charge.

FACTS.

Before stating our conclusions as to these various grounds of appeal, we deem it proper to notice, first, some of the general principles of law applicable to cases like the one at bar, as we understand them, which we will do in as few words as clearness and distinctness will admit of. The gist of all such actions is negligence, which must be proved by the plaintiff to the satisfaction of the jury, under the established rules, before a recovery can be claimed. Now, what is negligence? Negligence, as held in many cases, and as laid down by all text-writers upon the subject, is defined to be the absence of due care. What is due care? Due care is a relative term, each case having its own requirements in that respect; or, in other words, each subject-matter under the control and management of a person having its own demands as to due care. Consequently what would be due care as to one matter would not necessarily be so as to another. On this account it has been impossible for the law to establish any precise standard or legal definition of due care suited to every case, and which the trial judge should deliver to the jury as matter of law, to be compared by them with the evidence, so as to reach a satisfactory conclusion on the question whether or not due care is absent or present in a special case. All, therefore, that the law has determined, as a general rule, and all that the judge, in charging upon this subject, need say, is that the presence of due care negatives negligence, and that the absence of such care constitutes negligence, or, rather, affirms its presence; the jury being left to determine for themselves what due care requires, which in most cases, and especially in all matters of common concern, they are supposed to know, having a standard in their own minds with which they can compare and consider the testimony. In other cases outside of the ordinary concerns of life, and even in any case, we suppose, if thought advisable, the testimony of experts, or of others well informed upon the subject, might be offered by either party to show what due care required in the special matter before the court, and for the information and guidance of the jury. GENERAL PRINCIPLES.

Now, as negligence, which, as we have seen, is the absence of due care, is the gist of actions like the one below, in order to recover in such actions the absence of due care must be proved by the plaintiff. How is it to be proved? It may be proved by showing the existence of facts and circumstances which could not have occurred if due care had been present, or had been exercised; and, if such proof is introduced by the plaintiff, his case is made out, unless counter-testimony sufficiently strong to overthrow the plaintiff's evidence is introduced by the defendant. And we may say that this is the general and perhaps the most satisfactory way of proving negligence, to wit: by the proof of facts and circumstances of a character which could not have existed if that due care had been exercised which, in the opinion of the jury, PROOF OF NEGLIGENCE.

founded upon their own knowledge or evidence, as the case might be, the matter in hand required. While this is the general way, yet can it be said that this is the only way in this State?

This brings us to Danner's Case, 4 Rich. 330, which of late has become so prominent. We do not propose to discuss this case, or to examine again into its basis of foundation, with the view to test its correctness. It was decided in 1851, and it has been followed and affirmed in several cases since, after full consideration of the principles upon which it was originally based; some of these cases reaching down to a very recent date, due regard being had in their adjudication to the recent acts known as the "stock law." Under these circumstances, we must regard the rule laid down therein as the settled law of South Carolina, at least as long as these cases stand not overruled.

What is the rule in Danner's Case? Briefly, that case decided that, in cases like that before the court, evidence by the plaintiff that his cattle had been killed by a railroad train proved by legal inference the absence of due care; in other words, the presence of negligence, at least so far as to allow the plaintiff to rest, and to await the defendant's testimony, the plaintiff being entitled to recover unless the defendant's testimony removed or overthrew the *prima facie* case thus made out by the plaintiff. It was a judicial determination of the effect which such testimony, offered by the plaintiff, should have in all such cases, and it was established from the necessity of the case. To state the rule and its effect somewhat more distinctly, we may say that while, as a general rule, the plaintiff, in order to establish negligence, which he has charged, and which is the gist of his action, should prove the existence of facts and circumstances, if within his power, sufficient to exclude the idea of due care, yet, in cases like that below, Danner's Case has established the principle, which may be regarded as an exception to the general rule, that proof of the single fact of the killing of plaintiff's cattle shall have the effect, in the first instance, of the proof of all the facts necessary to show negligence; the court, in that case, determining, not that the plaintiff could recover without proving negligence, or that it was the duty of the defendant to disprove it in advance of the plaintiff proving it, but that the plaintiff's evidence was sufficient, *prima facie*, to establish it.

If this be the true meaning of the rule in Danner's Case,—and of this there can be no doubt,—then it must be conceded that, when a case is brought under that rule by the required evidence, negligence at once attaches to the defendant by presumption of law. The question now arises, how long is this *prima facie* presumption to remain, and to what extent is it to go?

Suppose the defendant in reply introduces testimony purporting to show the attendant facts and circumstances, does the presumption still remain of force until it is determined by the jury that

these facts and circumstances have overthrown it, by establishing the presence of due care, or does it leave, *ipso facto*, by the introduction of such testimony, the question of negligence to depend upon the force and effect of such testimony, unaffected by such presumption? In other words, will the introduction of such testimony by the defendant expunge the presumption, leaving the case to stand upon the circumstances thus brought to light, with the onus on the plaintiff to prove negligence therefrom, as in ordinary cases. We think that, when once this presumption is established, it remains of controlling force until the defendant's evidence overthrows it, by showing either due care, unavoidable accident, or something of that kind, the burden to show which is by the *prima facie* case of the plaintiff, by operation of the rule in Danner's Case, thrown upon the defendant. We think so for several reasons.

In the first place, the adverse doctrine would completely emasculate and fritter away the rule. It would, in effect, overrule by implication Danner's Case, and all of the subsequent cases on the same line, in face of the fact that we have expressly declined to interfere with said rule. True, when all the attendant facts are brought forward, they will show necessarily either negligence or the absence of it, and in such case the presumption cannot be of much importance; but who is to say whether or not all the facts are brought to light in a given case? The doctrine against which we are contending is that the rule in Danner's Case applies only to cases where the defendant introduces no evidence, and makes default; and that where he introduces testimony in his defence, whether such testimony exculpates him or not, yet at that moment, and by that means, the presumption is expunged and the rule avoided, leaving the case to be decided by the facts as presented, regardless of the presumption. If this were the rule, how easy it would be for the defendant in every case to escape liability. In most of these cases the defendant alone knows all the facts; he knows the favorable as well as the unfavorable circumstances; and if he can remove the presumption, which is all that is against him at the close of the plaintiff's testimony, by simply entering upon his defence, whether he makes a full or only a partial disclosure or not, of course he will stop short of inculpation; and who can say that he has stopped short? Besides, if he can expunge the presumption by simply offering testimony of such facts as he may choose to present, claiming them to be all the facts, he would have the power to determine the facts upon which the case would have to be tried, with the opportunity and inducement of excluding all such facts as might tend to inculpate him; thus leaving the rule in Danner's Case inert and lifeless, though still standing in our decisions as established law.

In the next place, while it is admitted that the presumption in

question is not a conclusive presumption, yet we think it is a presumption belonging to that class known in the law as disputable, and, in our opinion, is governed by the rule which has been established as applicable to such presumptions. Now, what is that rule? In Rapalje & Lawrence's Law Dictionary, title "Presumption," we find the following: "Presumptions of this kind [disputable] are inferences which the law requires to be drawn from given facts, and which are conclusive until disproved by evidence to the contrary. Thus an infant between seven and fourteen is considered incapable of committing a felony, but evidence may be given to prove a felonious intent;" or, as Mr. Greenleaf expresses it: "The rule in this class of presumptions [disputable] has been adopted by common consent, from motives of public policy, and for the protection of the general good, yet not, as in the former class [conclusive], forbidding all further evidence, but only excusing or dispensing with it till more proof is given on the other side to rebut the presumption thus raised. . . . This legal presumption is to be regarded by the jury in every case as matter of evidence, to the benefit of which the party is entitled." Greenl. § 34.

So that the presumption in these cases, being a legal one, drawn by the law, can be removed in no other way than by evidence sufficiently strong to rebut it. When the defendant offers no evidence, it becomes conclusive. When the defendant offers evidence which not only fails to explain, but in itself shows negligence, of course the plaintiff will prevail. But if defendant's evidence overthrows the *prima facie* case, and makes out affirmatively a case of accident, the presumption is gone, and the plaintiff must fail. Suppose, however, the evidence of defendant proves nothing,—neither negligence nor the want of it,—can it be said that the mere offering of that evidence will remove the *prima facie* case, and shift the burden of proof, making it necessary for the plaintiff at his peril to show negligence by affirmative proof? We cannot think so. On the contrary, we think the proper understanding of the rule in Danner's Case, as in all other cases of legal disputable presumptions, is that it remains until the explanation offered is strong enough to rebut it, by making out affirmatively a case of accident. The opposite interpretation, which limits the *prima facie* case to cases where the defendant offers no evidence, is based upon the view that the presumption upon which the *prima facie* case rests is only raised by the single fact of the defendant offering no testimony, and therefore, when evidence is offered, there is no presumption, according to the maxim, *cessante ratione, cessat ipse lex.* If this assumption was true, there would be much force in the argument. But we do not agree to this interpretation. It is true that, in some of the cases, the circumstance of the defendant offering no proof is adverted to by way of justifying the application of the rule in

such cases. But we think a careful reading of the cases will show that it was not the absence of testimony simply from the defendant which required the rule, but it was the absence of exculpating testimony, which, if it existed, the defendant alone had the power to produce, as it was not supposed that the plaintiff could know the facts; these occurrences frequently taking place in the nighttime, and in unfrequented places, when no one is present except the employees of the road, the necessity of the case, therefore, requires the rule.

That we thus understood and interpreted the rule when the recent case of Jones *v.* Columbia & G. R., 29 Shand. 258, was decided, appears from the following language used therein, to wit: "The rule in Danner's Case required the judge to say, when the killing was proved, that the plaintiff might rest; and if the defendant failed to explain this killing so as to exculpate the company, either by proof that the killing was accidental, unavoidable, or free from negligence, then the fact of killing, with the *prima facie* case which it made, was sufficient, as this furnished all the proof which the case in the first instance required." AUTHORITIES EXAMINED.

Nor was this in any modified in the recent case of Fuller *v.* Port Royal & A. R., not yet reported.. In that case we said "that if the judge had been requested to charge that upon the defendant introducing evidence to explain the killing, that then whether the presumption of negligence arising from plaintiff's proof of ownership and the killing was overthrown would depend upon the preponderance of the evidence, and the judge had declined to so charge, the appeal would be sustained;" showing clearly that we regarded the presumption of force until it was overthrown by the preponderance of the evidence; that, having once been raised, under Danner's rule, it remained until removed by counter-proof overthrowing it, which would depend upon the preponderance.

And this, it seems to us, is in exact accordance with the law laid down by our own court in Zemp *v.* Railroad Co., 9 Rich. 84; Judge O'Neall delivering the opinion, in which he said: "I agree entirely with the principle extracted from the case of Hegeman *v.* Western R. Co., 16 Barb. 353, that, 'where a party [a passenger] is injured on a railroad, there is, from that fact alone, *prima facie* evidence of neglect in the management of the road, which evidence defendant is bound to rebut.' If this be the true rule, as I am sure it is, how would this case, tested by it, stand? The injury is abundantly shown, and the *prima facie* case thus plainly made out. . . ." In that case much evidence was offered by the defendant, but the *prima facie* case was not rebutted. True, that was a case of a passenger injured, but upon the point of removing the *prima facie* case we do not see how it can be

distinguished from a case of cattle killed or injured; the underlying principle being the same in both cases.

Now, let the exceptions be tested by the principles above, and, first, as to the motion of nonsuit made by the defendant. The judge refused this, under the rule in Danner's Case; the plaintiff having closed her case on proof of the killing, and the ownership of the mules in question. There certainly was no error in this, as it cannot be contended that Danner's Case was not in point.

INSTRUCTIONS AS TO NEGLIGENCE CONSIDERED.

The plaintiff's first exception is that his honor erred in charging the jury that, "to entitle plaintiff to recover, there must be evidence that the stock was killed by reason of the negligence of the defendant, and that the plaintiff in no manner contributed directly to the injury." Understanding this charge to mean that, before plaintiff could recover, she was bound, not only to establish negligence on the part of defendant, but also to prove the absence of contributory negligence on her own part, we think the charge, as to the latter portion, was error. It was in conflict with the case of Carter *v.* Columbia & G. R., 19 S. Car. 20, and Crouch *v.* Railroad Company, 21 S. Car. 495, and also with the general doctrine that contributory negligence is a matter of defence which, to avail the defendant, must be made out by him.

Second. "That the defendant has the exclusive right to its track and right of way, and, if the stock was on it without the permission of the defendant, it was trespassing." The character of defendant's right to its track and right of way, and, as an incident thereto, whether the stock was trespassing, would depend upon the deed or other conveyance under which the defendant was using the same. It would be a matter of construction; and, as no deed or conveyance appears in the case, we have no means of determining whether this exception is well taken or not.

Third. That his honor erred in charging "that if the train was running at a lawful rate, and had the customary appliances and the customary force of trainmen, and the stock, when seen by the engineer or might with due care have been seen, was so close that the train could not be stopped in time to avoid striking it, then the plaintiff cannot recover." In this his honor charges, as a matter of law, that the facts mentioned would show the presence of due care, thereby negativing negligence. We do not think this was error, because, while it is true, as we have said above, that, as a general rule, what constitutes due care, as well as whether it is absent or present, must be left to the jury as a mixed question of law and fact, and while, also, the law having given no better definition of negligence than that it is the absence of due care, the judge would meet his duty in saying that much, and no more, yet we do not think that it would be a legal error for the circuit judge to state to the jury, in a like case, that certain facts, if proved,

would negative negligence, as was done by his honor below in the language of this exception. It is therefore overruled.

Fourth. That his honor erred in charging "that much less care is required of railroad companies in providing against stock on its track since the passage of the stock law than before its passage." We think this was in accordance with the recent cases of Jones *v.* Railroad Co., Simkins *v.* Railroad Co., and other cases, and therefore not error.

Fifth. That his honor erred in charging "that, if the stock was on the track without permission, plaintiff connot recover, unless there was evidence to satisfy the jury that defendant might have avoided the accident by the use of ordinary care and prudence." This, if it be the law, would practically abrogate the rule in Danner's Case. It is not to be supposedthat stock has ever been, or ever will be, on a railroad track by the "permission" of the company. No doubt, in every case when on the track, they are there without "permission;" so that such a rule would require the plaintiff, in every case, to satisfy the jury that defendant might have avoided the accident by the use of ordinary care and prudence. We think this charge was error.

Sixth. That his honor erred in charging: "If you are satisfied that the injury did take place as alleged, then the inquiry will be, was the injury the result of accident which could not be avoided by the use of due care on the part of defendant's employees? If so, the plaintiff cannot recover. If, however, the injury did take place as alleged, and might have been avoided by the use of due care by the defendant's agents or servants, the defendant would be liable, unless the injury was the result of the plaintiff's negligence or misconduct. If the stock was killed as alleged, but was on the lands of defendant at the time of the injury, and it has not been shown that the accident was the result of want of ordinary care and prudence on the part of defendant's servants, the plaintiff cannot recover." We see no error in this, provided that due weight was allowed to the rule in Danner's Case as to the *quantum* of evidence sufficient to establish the absence of due care *prima facie*, and also the force and effect of such *prima facie* case as laid down hereinabove.

Seventh. Because his honor erred in charging: "If there was no evidence in this case except that the cattle were found on the railroad under such circumstances as to justify the belief that they were killed by a collision with defendant's cars, the law would presume that such killing was the result of negligence; but when the facts are known, and put in evidence, there is no presumption of negligence, but the jury must find from the evidence whether or not there was negligence on the part of the defendant, and the burden of proof is on the plaintiff. When the defendants are guilty of negligence, they are not excused from liability by the

contributory negligence of the plaintiff, unless that negligence by the plaintiff was a proximate cause of injury." So much of this charge as held that, when the facts are put in evidence by the defendant, the presumption of negligence arising from the killing is removed, leaving the burden upon the plaintiff to show from the evidence, independant of the presumption, whether or not there was negligence, we think, for the reasons already given, was error; but in the remainder of this portion of the charge we concur.

Exception 8 complains that his honor the circuit judge failed to apply to the case section 1499 of the General Statutes, which provides that good and sufficient brakes shall be attached to every passenger car, and to all freight cars, except four-wheeled freight cars, and also upon every passenger train trusty and skilful brakemen, at least one to every two cars, and upon every freight train one to the last car of such train. His honor said, as there was no evidence as to whether the freight cars were four-wheeled or not, nor whether they were furnished with the number of brakes required, the presumption was that the company had complied with the act. This was equivalent to saying that, if a complaint was founded on the fact that the company had violated the act in these respects, in the absence of proof of such violation the complaint could not be well founded. There was certainly no error in this. His honor further said that, the train being a mixed one, composed both of passenger and freight cars, he was unable to apply the act, in so far, we suppose, as it required brakemen on passenger trains and freight trains running separately. Therefore he left it to the jury to determine whether the train was provided with the usual and proper appliances. Inasmuch as the act on the subject of brakemen applies in terms to passenger trains and freight trains, considered separately, we do not see how it could be applied to a mixed train like the one in question; and, not applying, the circuit judge was not in error in ruling that the usual and proper appliances would be all that were necessary.

The plaintiff made three requests to charge, which were declined by his honor.

(1) The killing being proved, . . . the law presumes negligence . . . until the contrary is shown, and this rule "of law is unaffected by the recent statutes requiring stock to be kept inclosed." Under Danner's Case, and also Jones *v.* Railroad Co., Simkins *v.* Railroad Co., *supra*, and Walker's Case, not yet reported, the plaintiff was entitled to this charge.

(2) "When it is doubtful whether an injurious act was negligent or accidental, the jury must decide, bearing in mind that it is not incumbent on the plaintiff to negative accident, but it is incumbent on the defendant to prove it." The circuit judge was right in not charging this request as made. As we have already said, in all of these cases the gist of the action being negligence, it is the duty

of the plaintiff to prove it; and this may be done in one of the ways mentioned above, to wit, either affirmatively, by proving facts which will show negligence, or presumptively, by the rule in Danner's Case, and, until he makes out a case sufficiently strong to go to the jury in one or the other of these ways, the defendant may fold his arms. But, such a case being made out, the defendant must by his evidence negative it, or the plaintiff will recover.

(3) "To maintain the defence, that the killing is accidental, it is not enough to show that it was unintentional, but it must appear to have occurred unavoidably, and without the least fault imputable to the person who does the injury." In so far as the circuit judge, in refusing this request, thereby impliedly held that an unintentional injury could not be a negligent one, or, rather, the result of negligence, we think it was error. Such a principle would prevent recovery in almost every case, as doubtless in most cases, if not in all, where injury has resulted from railroad trains, it has been unintentional.

It is the judgment of this court that the judgment below be reversed, and the case remanded for a new trial.

McGowan, J.—I concur.

McIver, J. (dissenting).—The plaintiff brought this action to recover damages for the killing of two of her mules by the train of the defendant company on the 17th of November, 1884. The plaintiff, after offering testimony tending to show that the animals were killed by the train, closed her case, without offering any testimony tending to show negligence on the part of the defendant, whereupon the defendant moved for a nonsuit, which was refused. The defendant then offered testimony tending to show the facts and circumstances under which the animals were killed, for the purpose of showing that there was no negligence on the part of the defendant, and for the purpose of showing that the mules were killed outside of the pasture in which they had been placed, and from which they had escaped by reason of a defective fence, and strayed onto the track of the defendant company, where they were killed at a point where the land on which the track was located did not belong to the plaintiff, and was not inclosed in the pasture. The plaintiff offered testimony in reply, and the case went to the jury, who found a verdict for the defendant; and judgment being entered thereon, the plaintiff appeals, upon numerous grounds in which exception is taken to nearly every proposition contained in what seems to be the carefully prepared charge of the circuit judge, set out in the case, as well as his refusal to charge as requested. It will not be necessary to consider these grounds in detail, but only to determine the material questions raised by them. These questions are—First, as to the application of the rule in

Danner's Case; second, as to the effect of the stock law; third, as to the instructions given to the jury in regard to section 1499 of the General Statutes.

Judge Kershaw, before whom this case was tried, unquestionably recognized the rule in Danner's Case, as it was only upon that ground that he could have refused the motion for nonsuit. But, in addition to this, when he said to the jury, "If there was no evidence in this case except that the cattle were found on the railroad under such circumstances as to justify the belief that they were killed by a collision with defendant's cars, the law would presume that such killing was the result of negligence," he not only recognized, but explicitly stated, the rule to the jury. The real complaint is, however, that, when he added the following language, "but when the facts are known, and put in evidence, there is no presumption of negligence, but the jury must find from the evidence whether or not there was negligence on the part of the defendant, and the burden of proof is on the plaintiff," he improperly restricted the application of the rule. This gives rise to the vital question in this case—a question which has not yet been distinctly decided by this court. In order to determine this question properly, it is necessary to inquire into the nature and foundation of this celebrated rule.

That it is simply a rule of evidence is clear from the language used by Judge Frost in the case in which it was originally propounded, and is made more manifest by the following language used by the chief justice in the recent case of Jones *v.* Columbia & G. R. Co., 20 S. Car 254: "There seems to be some misapprehension as to the real point decided in Danner's Case, as well as to the principles upon which it rested. The court did not decide that railroad companies were responsible in all cases where stock were killed on their track, whether the killing was wilful, negligent, or accidental; nor did it discriminate between slight, ordinary, or gross negligence. These questions were untouched, and left under the operation of the common-law rules already established. But what the court did decide was rather in the nature of a rule of evidence than otherwise, determining the quantum of testimony which might carry a case of this kind to the jury, and it seems to have been founded upon what the court regarded as a necessity in such cases. The court simply held that the plaintiff, upon proof of the killing, might rest; that this would make out a *prima facie* case of all that was necessary to hold the defendant responsible; and, if it remained unexplained, liability attached."

This is apparent, too, from the nature of the cause of action, one of the essential elements of which is the defendant's negligence, and which must therefore be established by the plaintiff in order to entitle him to recover. The test of this is that a failure to

allege negligence in the complaint would be fatal on demurrer, as the complaint would fail to state facts sufficient to constitute a cause of action. And here lies the difference between this action and an action to recover damages for a trespass. There it is only necessary to allege, and of course only necessary to prove, the act of violence constituting the trespass complained of; and any matter of excuse or justification relied on by the defendant is a matter of defence, and must be proved by him. Here, however, the negligence of the defendant is an essential element in the plaintiff's cause of action, and must, therefore, be not only alleged but proved by him, and the only effect of the rule in Danner's Case is to declare what shall be sufficient *prima facie* evidence of such negligence in certain cases. It certainly never was designed to impair or in any way infringe upon the well-settled and time-honored rule that he who alleges must prove, and that the plaintiff must therefore establish by legal and satisfactory evidence all the essential elements of this cause of action.

This being the nature of the rule, the next inquiry is as to the foundation upon which it rests. As has already been seen, it is founded upon the necessity of the case. Indeed, it would be difficult to find any other foundation upon which it could rest. It can scarcely be said that the natural and reasonable inference is that, whenever cattle are killed by a railroad train, it is the result of negligence on the part of those in charge of the train. When it is considered that a collision with cattle or other obstruction on the track always endangers, not only the property of the railroad company, but also the lives of its employees in charge of the train, it would seem that the natural and reasonable inference would be the other way, and that the natural instinct of self-preservation would presuppose care rather than negligence on the part of those in charge of the motive power of the train. Be that as it may, however, the authorities clearly show that this rule was founded on the necessity of the case, arising from the fact that, when animals are killed by a railroad train, the owner of such animals is rarely able to produce witnesses to prove the circumstances under which they were killed, while the railroad company, having the control of their employees intrusted with the management of their trains, can readily produce such witnesses. To use the language of Judge Frost in the case of Danner: "That the company did not produce witness to show how the damage occurred, nor explain why they omitted to do so, tends to induce the belief that they could make no defence. They had the witness under their control. The plaintiff may not have been present when his cattle were killed, and may not be able to discover who were the persons employed on the train when the damage was done. When a party is charged with an act or declaration which may subject him to an action, and does not deny it, his silence is construed into an admission. The same construction

may be put on a party's omission to offer testimony in his defence when it is in his power to produce the witnesses who might exculpate him." This language is quoted with approval by the chief justice in Jones *v.* Columbia & G. R. Co. 20 S. Car. 255, and to it is added these words: "This was the principle upon which the case [Danner's Case] turned, to wit: the fact that it was in the power of the defendant alone to explain, and that he failed to attempt it."

Such then being the nature and foundation of this purely artificial rule of evidence, it would seem clear that it is only applicable where the necessity for it exists,—*cessante ratione, cessat ipse lex*,—and that where, as in this case, the witnesses who were present at the time are examined, and the facts and circumstances under which the animals were killed are in testimony before the jury, there is no room or necessity for any presumption, and the jury must determine from such facts and circumstances alone whether a case of negligence has been made out. Indeed, this is the necessary inference from the terms of the rule as stated in the cases.

In Danner's Case it is thus stated: The point is "whether, when it was proved that the cattle of the plaintiff, pasturing on his own land, were killed by the passenger train of the company, in its progress along the track of the road, and the particular circumstances of the destruction were not disclosed, the jury might infer negligence from these facts."

The rule as stated in Wilson *v.* Railroad Co., 10 Rich. 52, is manifestly taken from the syllabus of Danner's Case, and not from the opinion of the court as given above, and therefore requires no further notice.

In Murray *v.* Railroad Co., 10 Rich. 227, the rule is not formulated, but Judge Wardlaw, in delivering the opinion of the court, uses this language: "The court acquiesces, too, in the reference which the recorder made to Danner's Case for the presumption which arises from the killing of the horse by a train of cars, established and unexplained, and for the unfavorable inference raised by the absence of all the defendant's agents who were at the killing. Negligence, rather than accident, is shown by proof of damage done by a train *when nothing more appears*.

In Jones *v.* Columbia & G. R. Co., 20 S. Car. 254, the chief justice, in commenting upon and explaining Danner's Case, used this language: "The court did not hold that the proof of negligence was unnecessary, or that it was not incumbent upon the plaintiff to offer such proof, but it held that, while this fact was a necessary ingredient in the liability of defendant, yet the proof of the killing, *unexplained by the circumstances or by the testimony of the defendant* furnished in itself sufficient evidence of the presence of such negligence as would hold the defendant responsible."

The italics used in the foregoing quotations are not employed for the purpose of conveying the impression that they are to be found in the cases from which these extracts are taken, but solely for the purpose of indicating what language is relied upon to show that the rule has always been confined to those cases in which the necessity for it exists,—that is, where the fact that animals have been killed by a railroad train has been proved, *and nothing more*, —and that there is no authority for its application where the facts and circumstances of the killing are in evidence from which the jury can determine whether there was any negligence on the part of the defendant. Indeed, it is difficult to understand how the rule could be applied to such a case without not only utterly disregarding the foundation upon which it rests, but also changing its very nature, by which, in a certain class of cases, evidence is artificially supplied in the absence of testimony derived from the usual sources; for, when the facts and circumstances attending the killing are put in evidence, the jury must undoubtedly weigh them for the purpose of determining whether there was any negligence; and how such facts and circumstances are to be compared in weight with an artificial presumption—an unknown quantity—it is difficult to conceive. The only way such a presumption could operate in such a case would be by changing the burden of proof, and this would be in violation of the well-settled rule, both of logic and of law, that he who affirms must prove, and would not only relieve a plaintiff from establishing in the first instance one of the facts material to his cause of action by testimony drawn from the usual sources, but would require the defendant to disprove such fact.

It is contended, however, that the foregoing views are in conflict with the recent decision in the case of Fuller *v.* Port Royal & A. R. Co., No. 1791, not yet reported; and it cannot be denied that some of the language used in that opinion, when looked at apart from the question made in that case, does appear to support such contention. But a careful examination of that case will show that the point there decided, which alone is authority, is not in conflict with the views above announced. In that case the circuit judge was requested to charge the jury "that, when the plaintiff proves the ownership and the fact of killing, he makes out a *prima facie* case, and negligence is presumed; but when the defendant introduces evidence, and explains the fact of the killing, the plaintiff is required to prove by a preponderance of testimony that the defendant was negligent." And the sole question presented by the appeal was whether the judge erred in refusing to charge as thus requested. Now, when it is considered that the rule is that, "where requests are made for the charge of the judge upon propositions submitted as a whole, unless they are correct as a whole it is not his duty to disconnect them, sustaining such as are sound, and rejecting such as are unsound; he is to consider them as presented,

and sustain or reject accordingly" (Gunter *v.* Graniteville Mfg. Co., 15 S. Car. 443),—it is very manifest that there was no error in refusing to charge the request in the form in which it was presented, as it implied that, even though the evidence offered by the defendant explanatory of the fact of the killing might of itself show negligence, yet still the plaintiff would be bound to offer evidence to prove negligence. As is said in Fuller's Case: "If the appellant had called upon the presiding judge to charge that, in case the explanation disproved negligence, then the presumption could have no avail, but that plaintiff's case should then depend upon the preponderance of his evidence weighed with defendant's evidence; or if the judge had been requested to charge that upon the defendant introducing evidence to explain the killing, that then whether the presumption of negligence arising from plaintiff's proof of ownership and the fact of killing was overthrown, would depend upon the preponderance of the evidence,—and the judge had declined to so charge, his appeal would be sustained. But this was not the request. The request was that in every case where the defendant explained the killing, whether this explanation had the effect of failing to exculpate, or of exculpating or inculpating, the defendant, the presumption is expunged from the case, and that the plaintiff is then required to prove, by a preponderance of testimony, other than the presumption, that the defendant had been negligent." The real vice in the request was that it went too far, and covered a case in which the testimony adduced by the defendant might itself show negligence; and therefore, as it could not properly be charged as a whole, under the rule above stated, there was no error in refusing it altogether. The true view of the matter is that the artificial rule of evidence, established by Danner's Case, can only be available in the absence of testimony derived from the usual sources; but, where such testimony is adduced, then the jury must draw their conclusions *from that testimony*, as in all other cases. It is quite clear that Judge Kershaw instructed the jury in accordance with this view, and hence there was no error on this point.

2. As to the stock law. The jury were practically instructed that, since the enactment of that law, the same amount of care is not exacted of a railroad company in running its train through uninclosed lands as formerly, for the very obvious reason that now, since by statute it is made unlawful for the owners of cattle and other domestic animals to suffer them to roam at large beyond the limits of their own land, those in charge of railroad trains have not the same reason to expect to find cattle or other animals upon the track, running through uninclosed lands, as formerly, and therefore the same amount of care is not required to avoid collision with such unexpected obstructions.

In this there was no error. On the contrary, it seems to be in

accordance with what was said in Simkins *v.* Columbia & G. R. Co., 20 S. Car. 265: "It should be observed here, however, that negligence is a relative term, and its existence in a given case depends upon the requirements of the occasion. I mean to say that an act may be negligent under one state of facts when the same act, under a different state of facts, might be entirely free from negligence. For instance, to drive a wild and dangerous horse, and of unusual speed, along a crowded street, with hundreds of persons and vehicles on the way, would be a negligent act, for the injurious consequences of which, if any, a party could no doubt be held responsible; but to drive the same horse, at the same speed, along an unoccupied street, or along some secluded road in one's own inclosure, seldom or never travelled by others, might be free from every feature of negligence. Soo, too, in those counties in the State where the stock law has not become the law, and where cattle are at liberty to roam at large upon railroad tracks and elsewhere, at will, for a train of cars to dash forward, without the precaution which should be observed in such cases, might be negligent; whereas the same train, going at the same speed, and without the same precaution, in the counties where the stock law has been adopted, and where the railroad employees had no thought that cattle would be found on the track, would not be a negligent act."

Whether it was a trespass for the mules of the plaintiff to go upon the uninclosed track or right of way, beyond the limits of the plaintiff's land, and outside of the inclosed pasture in which they had been placed, in such a sense as would have justified the railroad company in taking up the animals, and exacting from the owner the penalties provided by the state law, is an immaterial inquiry in this case. In fact, it is not material to inquire as to whether the mules were, in any sense, trespassing on the railroad track, for the jury were not instructed that the fact that the mules were trespassing would relieve the defendant from liability unless gross negligence was established, as was insisted upon in the Case of Simkins, *supra*, and in the Case of Jones, *supra*. On the contrary, the jury were, in effect, told that, even if the animals were trespassing, the defendant would be liable if the injury resulted from want of ordinary care on the part of the servants of the company, and this was in accordance with the rulings in the two cases just cited.

3. As to the instructions given to the jury in regard to section 1499 of the General Statutes. In the absence of any evidence tending to show a failure on the part of the company to comply with the requirements of that section, it is difficult to understand how the circuit judge could have properly instructed the jury otherwise than he did do. Where an attempt is made to hold a party liable for a failure to comply with the provisions of a statute,

surely some evidence tending to show such failure should be offered. Otherwise the court, contrary to well-organized principles, would be asked to presume that a person has violated the law.

The requests to charge must be considered, not as abstract propositions, but with reference to the case as made by the evidence. So considered, under the views hereinabove taken, they were properly refused.

The question whether the nonsuit was properly refused, though argued here, is not properly before the court. The defendant does not appeal, and it does not appear in the case that any exception was taken to the refusal of the motion. It may, however, be added that, under the rule in Danner's Case, the motion was properly refused; for, when the motion was made, no testimony as to facts and circumstances attending the killing of the mules had been offered, and in that condition of things the rule was applicable.

For these reasons I am unable to concur in the conclusion reached by the majority of the court.

SAVANNAH, FLORIDA AND WESTERN R. Co., Appellant,

v.

GEIGER, Appellee.

(21 *Florida*, 669.)

The common law, in so far as it requires the owner of live stock to keep them off the premises of another and renders him liable to the owner of such premises for the damage done by such stock, is not in force in Florida.

Cattle, horses, and other live stock running at large are not trespassers when they go upon the track of a railroad company, nor are their owners liable for damage resulting to the company from their going upon the track and an engine or train of cars running upon them.

The right of a railroad company to the use of its track is nothing more than the right of every other land proprietor in the actual use and occupancy of his land, and does not exempt the company from the duty enjoined by law upon every person so to use his own property as not to do any unnecessary injury to another.

A railroad company is liable for injuring or killing cattle or other live stock upon its track by its trains whenever such killing or injury is the result of negligence upon the part of the agents operating the train. The fact that the owner of the live stock permits them to run at large does not constitute contributory negligence.

Negligence on the part of a railroad company is the basis of the right of the owner of the live stock to recover, and it must be averred in the declaration, and be proved.

In an action by an owner of live stock against a railway company for killing or injuring the stock by its train, proof of the killing or injury is not of

itself *prima facie* evidence of negligence upon the part of the company or its agents. To make out a *prima facie* case of negligence there must at least be evidence of circumstances, from which a presumption arises that the stock would not have been run upon by the train but for want of care on the part of those operating it.

The legislature may provide that proof of the killing or damage to live stock by a railroad train or engine shall be *prima facie* evidence of negligence on the part of a railroad company or other person operating the railroad.

Where under the circumstances of the killing or injury it could have been avoided by the exercise of ordinary or reasonable care upon the part of the agents operating the train, and such care has not been exercised, the company will be liable; but if notwithstanding the exercise of such care the killing or injury would be unavoidable, the company is not liable.

Though owners of cattle and other live stock have the legal right to turn them out to range, yet in doing so they assume the risk of any danger which may result to the stock from their going upon the railroad track and being run upon by a train, when the circumstances are such as to render running upon them unavoidable notwithstanding the use of reasonable care by the person operating the train to avoid it.

The meaning of sections 1 and 2 of "An act to provide a means for the collection of claims for cattle and other stock destroyed by railroads" (chapter 2060, Acts of 1875), is that the "affidavit of the owner or some other person acquainted with the stock killed or maimed" shall be conclusive evidence of the amount of damages sustained by the owner, and such provision is void as not providing due process of law.

Where the subject expressed in the title of a statute is the provision of "a means for the collection of claims for cattle and other stock destroyed by railroad," and the body of the statute declares or creates an absolute liability which did not exist prior to its passage, such new liability is not within the subject expressed in the title, and to this extent the statute is inoperative under section 14 of article 4 of the Constitution.

APPEAL from the circuit court for Nassau county.

The declaration, omitting the court, is as follows: "Now comes J. H. Geiger, by P. B. Bedford, his attorney, and sues the Savannah, Florida & Western R. Co. operating a portion of their line, commonly known as the Waycross Short Line, from Jacksonville to Waycross, Georgia, a portion of said road lying in said county of Nassau, said Short Line not being fenced, for killing ten head of cattle, two head of sheep, and five head of hogs, in said county of Nassau, to wit, about the first day of November, 1884, the value of said cattle, sheep and hogs being one hundred and fifty-four dollars, and the plaintiff claims one hundred and seventy-nine dollars damages for his property so killed, and the further sum of twenty-five dollars."

The plaintiff filed, on the day of the filing of the declaration, an affidavit in which he deposes that the appellant "is indebted to him in the sum of one hundred and twenty-five dollars for ten head of cattle killed by said company, running their train through Nassau county (and giving the marks and brand of the cattle), which killing of said cattle damaged said affiant twenty-five dollars by loss occasioned from the loss of the use of said cattle; also two sheep worth four dollars (giving their marks), and for five head of hogs

worth twenty-four dollars (giving their marks), all of which said affiant claims damaged him in the sum of $179, besides the interest."

The railroad company demurred to the declaration as "not sufficient in law," and "in that it does not allege that the damage thererein complained of is due to any negligence, default, or misconduct on the part of the defendant, its officers, agents, or employees."

The circuit court overruled the demurrer and the company pleaded "not guilty."

There was a trial by jury and verdict for the plaintiff, assessing his damages at $146, and judgment accordingly.

The circuit judge charged the jury, at the defendant's request, that a railroad company is not required by the laws of Florida to fence its track, and that failure to fence its track should not be considered negligence on the part of the company; and that the measure of damages in cases where the animals were killed is the actual market value of the same at the time of killing.

He also charged on his own motion that "the fact of killing an animal of value by the railroad company's engine has been made *prima facie* evidence of negligence on the part of the company, under the statutes of this State, which presumption may be rebutted by evidence on the part of the defendant company."

The defendant also requested the judge to give the jury the following several instructions:

"2. To entitle the plaintiff to recover from a railroad company damages for killing or maiming domestic animals in this State, it is necessary for him to prove that the killing or maiming was the result of the wilful or negligent misconduct of the defendant, its officers, agents or employees."

"3 The mere fact of injury is not a presumption of wilful or negligent misconduct against the company."

"4. To enable the plaintiff to recover for damages it is necessary for him to prove that he used ordinary care to avoid injury, or else if he did not observe ordinary care that the absence thereof did not conduce to the injury."

"6. The burden of proof as to all acts or state of facts as causes of liability is on the plaintiff in such cases."

"7. The fact of killing an animal of value by the company's engines is not *prima facie* evidence of negligence on their part."

Each of these instructions was refused by the judge, and the defendant company excepted, as it did to the charge stated above to have been given by the judge of his own motion.

The other facts are sufficiently stated in the opinion of the court.

Fleming & Daniel and *Robert W. Davis* for appellant.

T. B. Bedford for appellee.

RANEY, J.—This is an action brought by the appellee to recover of the appellant for cattle, sheep, and hogs killed by a train upon the latter's railroad track.

At the common law, every entry upon another's land (unless by the owner's leave or in some particular case which it is unnecessary to mention) was treated as an injury or wrong, for satisfaction of which an action of trespass would lie, the *quantum* of the satisfaction being determined by considering how far the offence was wilful or indiscreet, and by estimating the value of the actual damage sustained. This law styled every unwarrantable entry on another's soil a trespass by breaking his close, and the writ commanded the defendant to show cause wherefore he had broken it. In the eye of the law every man's land was inclosed and set apart from his neighbor's, either by a visible and material fence as one field is divided from another by a hedge, or by an ideal invisible boundary existing only in contemplation of the law, as when one man's land adjoins another's in the same field. Every such entry or breach of a man's close carried necessarily along with it some damage or other, for if no other special loss could be assigned, still the words of the writ itself specified one general damage, the treading down and bruising his herbage. A man was moreover answerable not only for his own trespass but that of his cattle also, for if by his negligent keeping they strayed upon the land of another (and much more if he permitted it or drove them on) and they there trod down his neighbor's herbage or spoiled his corn or trees, this was a trespass for which the owner must answer in damages; and the law gave the owner of the land in such cases a double remedy by permitting him to distrain the cattle thus *damage feasant* till their owner should make him satisfaction, or else by leaving him to the common remedy of trespass *quare vi et armis clausum*, etc. 1 Blackstone Comm, 208, 211.

TRESPASS AT COMMON LAW.

It is material to inquire at this point whether or not the above principles of law which unquestionably require an owner of stock to keep them off another's land in so far as the rights and property of such other persons are concerned, are as to cattle and other stock of the kind mentioned in the declaration, still in force in Florida.

So early as the year 1823, at the second session of the legislative council of the Territory, a statute regulating fences was enacted to take effect from and after the first day of the then ensuing May. After prescribing by its first section the dimensions of the fence, it provided, by section 2, that if any trespass or damage should be committed on any garden, orchard, plantation, or settlement, not fenced or inclosed as prescribed, by the breaking in or straying of any cattle, horses, sheep, goats, or swine, the owner thereof shall not be liable to answer for or make good any damage or injury hap-

FLORIDA STATUTES AS TO STOCK AND FENCES.

pening or committed by reason thereof; and further that in case any person should kill, maim, or hurt any such stock so straying or breaking into any such place or settlement not so fenced or inclosed, he should answer and make good to the owner of the stock all injury and damage sustained thereby; and, by section 3, imposing upon any person not having such a lawful fence a penalty for fixing in his enclosure any canes, stakes, or anything that might hurt or kill such animal. In 1824 this act was amended in so far only as to make some changes in the requisites of a "worm fence." In 1885, a period subsequent, however, to the accruing of the alleged cause of action, an act (chapter 3619) practically revising the above legislation was approved, the first section of which prescribes what shall be deemed a lawful fence, and the second and third sections of which are in effect a re-enactment of the second and third section of the act of 1823. In 1871 it was made a misdemeanor, by chapter 1846, for one, not having a sufficient fence to prevent the intrusion of animals, to kill, wound or disfigure any animal of another person in attempting to expel it from his premises.

In 1823, a statute, reciting that a practice hath hitherto prevailed of driving large quantities of neat cattle from the several adjoining States by citizens thereof, and that it was consistent with justice and good policy that all persons who enjoy the benefits and advantages of a State or Territory should contribute and share with the good people thereof the expense and labor of supporting and defending the same, was enacted which taxed such cattle *per capita*, its provisions not applying to persons actually "removing into" the Territory and bringing their cattle with them (Acts of 1823, p. 111); and in 1835 it was made unlawful for a non-resident owner of cattle or stock to drive them upon lands within the Territory for purposes of grazing, and this upon penalty of forfeiture and sale. Duval Comp. 54, 60; McC's. Dig. 50.

In 1828 an act was passed which punished by fine any one who should drive, entice away, or remove any cattle from a pasturage or range, without leave of the owner of the cattle, and in 1829 it was modified so as to apply only to driving them more than five miles from the range or place where cattle most usually graze. Thomp. Dig. 136. And an act of 1832 punished any one who wilfully drove, removed, or enticed away any cattle from a pasturage or range. Thomp. Dig. 507. And by an act of 1868 (p. 423, secs. 9 and 10, McC's. Dig.) it is declared unlawful to drive another's cattle directly from their own range or more than five miles from the home of their owner without his permission. McC's. Dig. 423.

In 1877 "An act for the better protection of cattle in this State" was passed. It empowers each board of county commissioners to lay out the county into cattle districts, and for the appointments of cattle inspectors whose duty it is to inspect and record the marks

and brands of all cattle driven or shipped from their respective counties, together with the name of the person shipping, and the time, place, and vessel of shipment, and making it the duty of any one intending to drive or ship cattle from a county to notify an inspector where and when they will be concentrated for shipment, and prohibiting any purchaser from changing the marks and brands of cattle before having the change recorded in the office of the circuit court clerk, and requiring a record of marks of cattle driven from one county to another for the purpose of changing their range, or driven there and sold as beef cattle, and imposing suitable penalties for a violation of the act.

The estray laws now in force, like the original enactment of 1823, define estrays, and punish by fine, and subject to an action of damages, any one who vexatiously or maliciously takes up as an estray any animal named in the act contrary to its true intent and meaning. There has also been other legislation, needless to mention, in the interest of persons owning cattle on the range.

Nothing is clearer than that the purpose and effect of all this legislation were not only to change the common law and require of every landholder or other person that he should fence out his neighbor's and every one else's stock, if he desired protection against damage from them, but also to establish and protect a right in resident owners of stock for their cattle and other domestic animals to range and grange on all uninclosed lands free of charge, and without any liability for any damage resulting from their going upon or grazing on any lands whatsoever not inclosed by a lawful fence. No special interest is of much if any more moment to our State, and none elicited earlier legislative attention than stock raising.

LAWS AS TO LIVE STOCK POLICY.

Cattle, hogs, and sheep, if not all other kinds of live stock, not known to be dangerous, have been allowed, and accustomed at all times and in all parts of our State, since at least soon after its acquisition from the Spanish crown, to run at large and graze on all lands not inclosed by a fence. This has prevailed not only throughout the rural districts but also in the towns, although it is true that lately in some of the latter to a limited extent, and possibly entirely in a few instances, it has been restrained by local ordinance. A different policy than that which has prevailed would have proven ruinous to the important stock interests of different sections of the State; and the general legislation of later years has been no more favorable to such a policy than was that of the earlier period of our history and this, too, although in a few agricultural districts a financial deterioration has caused most of the fences which once protected large and valuable plantations to entirely disappear. In States having similar stock interests and customs and regulations to those indicated, it has been held that the common law indicated above as to cattle

has been superseded either as not suited to the institutions of the people or as repugnant to the legislation. Vicksburg & J. R. Co. *v.* Patton, 31 Miss. 156; Nashville, etc., R. Co. *v.* Peacock, 25 Ala., 229; Tripp *v.* Hasell, 1 Strobh. 173; Kerwacker *v.* C. C. & C. R. Co., 3 Ohio St. 172; Seeley *v.* Peters, 5 Gillman, 130; Gorman *v.* P. R. Co., 26 Mo. 441; Wagner *v.* Bissel, 3 Iowa (Clarke), 396; Heath *v.* Collenback, 5 Ib. 490.

DUTY OF RAILWAY COMPANY AS TO LIVE STOCK.

Such being the policy of our laws as to live stock—a policy which makes them free commoners—the next inquiry is whether any special exception from or against it has been created in favor of railroad companies. The general railroad law (chapter 1987, approved February 19, 1874) gives to every corporation formed under it the right to purchase, hold, and use all such real estate as may be necessary for the construction and maintenance of its road and the stations or other accommodations necessary to accomplish the objects of its incorporation, and to lay out and construct its road, and to take and convey persons and property over its road by the power and force of steam, or by any mechanical power, to receive compensation therefor, and do all the business incident to railroad business, and regulate the time and manner in which passengers and property shall be transported, and the compensation to be paid therefor. The 27th section provided that if any person should ride, lead, or drive any horse, or permit any animal belonging to him to stray, stand, lie, or walk, upon any railroad without the consent of the corporation or party having control of such road, he should for every such offence forfeit a sum not exceeding ten dollars and should also pay all damages sustained thereby to the company or party aggrieved. This section repealed by implication the former statutes providing for payment by railroad companies for stock killed, and it is unnecessary to mention them. At the next ensuing session of the legislature this section was expressly repealed by chapter 2059, approved February 13, 1875, passed solely for this special purpose, and thus was removed any special exception which may have been created in favor of railroad companies by said section.

There is no statute here which requires a railroad company to fence its track, and imposes on the company as a penalty for not doing so a liability for all stock killed or injured.

A corporation owning a railroad has certainly the right to own land and operate a railroad upon it, and to run its trains at such speed as its business requires and is consistent with the safety of passengers and freight, the condition of the roadbed and all appliances necessary and proper in the operation of a railroad being considered. Vicksburg and Jackson R. Co. *v.* Patton, 34 Miss., 156; Raifoad *v.* R. Co., 43 Miss. 239. "As to the rate of speed at which trains may be propelled it is dependent on several consid-

erations, the condition of the road, the usage of railroads generally, the amount of property and passengers offering for transportation; but the principle which underlies the subject is that the rate of speed must be reasonable, such as is consistent with the safety of the property and passengers in their care. Whatever rate be adopted, the company are in no degree to relax efforts to protect cattle from injury. If the convenience and business of the public demand a rapid transportation, they are not restrained from meeting the requirement because the danger to stock from a fast train is greater than from a slow one." 46 Miss. 581.

After the repeal of the 27th section alluded to, there was nothing left in the railroad act which required stock-owners to keep up their stock against railroad companies; and the acquisition by a railroad company of a piece of land, and its use by operating thereon a railroad, do not under the laws of this State impose upon a stock-owner a legal duty to keep his stock up, or in other words deprive him of the right to turn out his stock to range as free commoners. The company has a right to carry on its business upon the land as did its predecessor in ownership his avocation, but with the same relation to the rights of the stock-owner as to uninclosed lands. If cattle go upon the land pending the company's ownership, they are not trespassers in the eyes of the law, nor were they when its predecessor held it. No change has been made in this respect by the change of ownership. Alger *v.* M. & M. R. Co., 10 Ia. 268; Simkins *v.* C. & G. R. 20 S. Car. 259; 43 Miss. 239. Persons who incorporate under our railroad statute do so with knowledge of the rights of others, and the rule which claims of one person that he shall so use his own property as not unnecessarily to injure that of another, is as binding upon artificial as it is on natural persons. Ill. C. R. Co. *v.* Middlesworth, 46 Ill. 494. The owner of stock of course takes notice of the rights of the railroad company; and his stock wander upon the range with a knowledge on his part of the dangerous character of the company's business, and that he runs the risk of all unavoidable accidents and damage to them from the train. Kerwhacker *v.* C. C. R. Co., *supra;* 10 Ia. 286; 43 Miss. 230; 46 Miss. 573.

The grant of a right to one is not to be presumed as intended to take from another class a right previously established either by law or custom in the latter's favor. The repeal of section 27 removes the exception its enactment had made in favor of railroad companies as to stock legislation.

Whenever one of two persons having such rights claims that he has been damaged in his property by the other, and that he is entitled to have such damages made good, and the other denies such claim on the ground that what he did was in the exercise of his own right, the test of such right of recovery, in the absence of a wilful intent to injure, is whether the one who has done the in-

Danner's Case; second, as to the effect of the stock law; third, as to the instructions given to the jury in regard to section 1499 of the General Statutes.

Judge Kershaw, before whom this case was tried, unquestionably recognized the rule in Danner's Case, as it was only upon that ground that he could have refused the motion for nonsuit. But, in addition to this, when he said to the jury, "If there was no evidence in this case except that the cattle were found on the railroad under such circumstances as to justify the belief that they were killed by a collision with defendant's cars, the law would presume that such killing was the result of negligence," he not only recognized, but explicitly stated, the rule to the jury. The real complaint is, however, that, when he added the following language, "but when the facts are known, and put in evidence, there is no presumption of negligence, but the jury must find from the evidence whether or not there was negligence on the part of the defendant, and the burden of proof is on the plaintiff," he improperly restricted the application of the rule. This gives rise to the vital question in this case—a question which has not yet been distinctly decided by this court. In order to determine this question properly, it is necessary to inquire into the nature and foundation of this celebrated rule.

That it is simply a rule of evidence is clear from the language used by Judge Frost in the case in which it was originally propounded, and is made more manifest by the following language used by the chief justice in the recent case of Jones *v.* Columbia & G. R. Co., 20 S. Car 254: "There seems to be some misapprehension as to the real point decided in Danner's Case, as well as to the principles upon which it rested. The court did not decide that railroad companies were responsible in all cases where stock were killed on their track, whether the killing was wilful, negligent, or accidental; nor did it discriminate between slight, ordinary, or gross negligence. These questions were untouched, and left under the operation of the common-law rules already established. But what the court did decide was rather in the nature of a rule of evidence than otherwise, determining the quantum of testimony which might carry a case of this kind to the jury, and it seems to have been founded upon what the court regarded as a necessity in such cases. The court simply held that the plaintiff, upon proof of the killing, might rest; that this would make out a *prima facie* case of all that was necessary to hold the defendant responsible; and, if it remained unexplained, liability attached."

This is apparent, too, from the nature of the cause of action, one of the essential elements of which is the defendant's negligence, and which must therefore be established by the plaintiff in order to entitle him to recover. The test of this is that a failure to

allege negligence in the complaint would be fatal on demurrer, as the complaint would fail to state facts sufficient to constitute a cause of action. And here lies the difference between this action and an action to recover damages for a trespass. There it is only necessary to allege, and of course only necessary to prove, the act of violence constituting the trespass complained of; and any matter of excuse or justification relied on by the defendant is a matter of defence, and must be proved by him. Here, however, the negligence of the defendant is an essential element in the plaintiff's cause of action, and must, therefore, be not only alleged but proved by him, and the only effect of the rule in Danner's Case is to declare what shall be sufficient *prima facie* evidence of such negligence in certain cases. It certainly never was designed to impair or in any way infringe upon the well-settled and time-honored rule that he who alleges must prove, and that the plaintiff must therefore establish by legal and satisfactory evidence all the essential elements of this cause of action.

This being the nature of the rule, the next inquiry is as to the foundation upon which it rests. As has already been seen, it is founded upon the necessity of the case. Indeed, it would be difficult to find any other foundation upon which it could rest. It can scarcely be said that the natural and reasonable inference is that, whenever cattle are killed by a railroad train, it is the result of negligence on the part of those in charge of the train. When it is considered that a collision with cattle or other obstruction on the track always endangers, not only the property of the railroad company, but also the lives of its employees in charge of the train, it would seem that the natural and reasonable inference would be the other way, and that the natural instinct of self-preservation would presuppose care rather than negligence on the part of those in charge of the motive power of the train. Be that as it may, however, the authorities clearly show that this rule was founded on the necessity of the case, arising from the fact that, when animals are killed by a railroad train, the owner of such animals is rarely able to produce witnesses to prove the circumstances under which they were killed, while the railroad company, having the control of their employees intrusted with the management of their trains, can readily produce such witnesses. To use the language of Judge Frost in the case of Danner: "That the company did not produce witness to show how the damage occurred, nor explain why they omitted to do so, tends to induce the belief that they could make no defence. They had the witness under their control. The plaintiff may not have been present when his cattle were killed, and may not be able to discover who were the persons employed on the train when the damage was done. When a party is charged with an act or declaration which may subject him to an action, and does not deny it, his silence is construed into an admission. The same construction

that the damage in this case arose from what the law considers a mere accident." In Piggott *v.* E. C. R. Co., the thatch of a shed near the road was observed immediately after the passing of a train to be on fire, and notwithstanding every exertion upon the plaintiff's part to extinguish the fire it communicated with several other buildings and destroyed them. The wind was blowing towards the premises from the road. Against defendant's objections witnesses were allowed to testify to the falling of sparks on other occasions at this point, for the purpose, however, of ascertaining whether sparks could be thrown for so great a distance from the railroad. Other witnesses practically acquainted with the construction and working of engines generally in use on railroads testified that the emission of sparks or ignited matter from the top of the chimney might, in a great measure, be prevented by a cap or covering of wire-work or by perforated plates, for intercepting the escaping particles, though it was admitted that this would to a certain extent impede the draft and consequently diminish the power of the engine. They, however, stated that this might be remedied or the emission of sparks altogether prevented by employing engines of such power that they need not be worked to their utmost capacity, and that in their judgment, to produce the alleged injury the engine used on the occasion in question must have been worked to its utmost; and that the danger arising from the emission of sparks might be entirely prevented by shutting off steam on passing a spot where danger was to be apprehended. There was a verdict for the plaintiff. Upon motion for a new trial, Chief Justice Tindal, after remarking that the law requires of railroad companies, operating, as they do, agents of an extremely dangerous and unruly character, that they adopt such precautions as may reasonably prevent damage to the property of third persons near which their railway passes, said that the evidence in this case was abundantly sufficient to show that the injury was caused by the emission of sparks or particles of ignited coke from one of the defendant's engines, and that there was no proof of any precaution adopted by the company to avoid such a mischance, and that the jury was right in finding that the company was guilty of negligence; and after citing as parallel to the want of the precaution as to the sparks suggested by witnesses the case of one allowing a dog, known to be accustomed to bite, to go about unmuzzled, remarked: "The precautions suggested by the witnesses called for the plaintiff in" this case, may be compared to the muzzle in Smith *v.* Pelch, 2 Strange, 1267. The other judges took substantially the same view, not using, however, the illustration as to the muzzled dog. The case of Ellis *v.* P. &. R. R. Co., was where the fence was proved to have been discovered to be on fire immediately after the engine passed, and some of it burned before the fire could be stopped. Plaintiff proved the engines upon the road usually had "spark-catchers on the funnel," but whether

they were on this particular engine at this time he did not recollect. It was held that though negligence was the gravamen of the plaintiff's case, yet when he shows damage resulting from defendant's act, which act with the exercise of proper care does not ordinarily produce damage, he makes out a *prima facie* case of negligence which cannot be repelled but by proof of some extraordinary accident which renders care useless.

The breaking of the axletree in the Christie case was itself *prima facie* evidence of neligence on the part of the owner of the coach. It was his duty to have axletrees sufficient for the purposes of his business. The breaking under the circumstances was evidence that he fell short of this duty, and that the coach was not then "well built." There is nothing in the case intimating that it is ever unnecessary for the plaintiff, whatever his ignorance of the nature or character of the real cause of the mishap, to go so far as to prove some fact which is of itself *prima facie* evidence of neglect or failure upon defendant's part in doing his duty. The Piggott and Ellis cases are based upon the principle that the use of well-known appliances, which it is the duty of the operators of railroads to use, will, as a general rule, prevent such escape of sparks as will set fire to buildings and fences standing adjacent to the road. In all such cases the relation of the structures to the road is always established, and is always well understood or can be readily seen or learned by the agents operating the train approaching or passing them.

The nature of the South Carolina case and that before us does not properly assimilate to the four cases we have reviewed. No inherent defect is shown in anything relating to the road or train as was shown in the coach in Christie's Case. The fixed relation which buildings and fences bear to the track and to passing trains, and which has enabled science and skill to provide those appliances which as a general rule prevent such escape of sparks as will set fire to and burn them, has no counterpart in the uncertain and varying circumstances under which cattle may appear on a railroad track. To put the two classes of cases on a level we think it at least necessary to establish by evidence the locality on the road where the collision occurred. These varying circumstances render it impossible to establish a rule like that in the Piggott and Ellis cases, except upon the false basis of assuming a fixed state of circumstances for something that is wholly uncertain in its nature. The law permits a train to be run upon its track as rapidly as its business requires and is consistent with the safety of the passengers and the property it transports, without moderating its speed on account of the probability of coming upon roaming cattle. It is in its nature a thing upon which in its legitimate use not only great force necessarily attends, but is of such a character that when moving at a legitimate or ordinary

rate of speed it cannot be stopped at once or always in time to avoid collision with something that may have unexpectedly come upon its track. The place or the circumstances of the coming of cattle cannot be anticipated, like the circumstances which may surround when a train passes a fence or a building. The law which permits the operation of a train charges the owner of any animal coming on its track with notice of its nature. If it be dangerous it is still lawful. In running at an ordinary speed it is doing nothing forbidden, but the very thing contemplated by its organization and required by the commerce of the country. It has just as much right to run as cattle have to range. Grant that cattle which go upon its track are not trespassers, nor their owners liable for damages resulting therefrom to the railroad companies (which is well settled by preceding authorities), yet when they do go upon it, and collision takes place and death or anything ensues to them, and nothing else appears, how can it be said that there is evidence of any omission of duty on the part of the railroad company or its agents, the law being, as it is, that it is not required to lessen the otherwise proper speed of its trains on their account? No one is presumed by the law to do wrong or not to do his duty. Proof of results which indicate only an ordinary and proper act, and no extraordinary or improper conduct in an individual, is no evidence of negligence on his part. Proofs of death to a hog, sheep, or cow by being struck by a railroad train is proof of a result which indicates nothing more than an ordinary operation of the train; to say that there was negligence we have to assume from what is altogether uncertain that the circumstances were of a certain character and such that the injury, or, what is tantamount, the collision, might have been avoided by the exercise of due care upon the part of the company's agents. Grant, as we must, that proof of the locality of the collision will generally show whether or not, by proper attention, the animal on the track could have been seen in time for the train to be stopped by the prompt use of the brakes and the collision avoided, yet when we know that cattle may and sometimes do come upon the track at places and under circumstances where this would be impossible, and it may be even where, for the protection of the lives of the passengers, an increase of speed is necessary (Owens *v.* Railroad Co., 58 Mo. 388, 389), still we cannot assume as a general rule not only the circumstances but that they were such that the killing would not have occurred if proper care had been shown, and as imply a want of care on the company's part.

The reasoning in Danner's Case is exceptional. Where the burden is put by the pleadings upon the plaintiff, there is no rule of law that the defendant's failure to produce witnesses upon trial, or his silence there as to what he may know, can be taken to make a *prima facie* case for the plaintiff. Where the plaintiff's evidence

is insufficient the plaintiff may demur to it successfully. The fact that witnesses to an occurrence are in the employ of a railroad company imposes upon it no more duty to produce them or their evidence at the trial than their being employed by an individual would impose upon him. The rules of evidence permitting proof by admissions—silence, where an act has been specifically charged in conversation against a defendant—has never been extended to a defendant preserving silence in court until a *prima facie* case has been made by plaintiff's evidence on the trial. Under our rules of evidence by which, as a general rule, neither interest nor being a party to the record disqualifies from testifying, "the fact that it was in the power of the defendant alone to explain, and he failed to do it," is not tenable as a principle upon which to support the ruling in Danner's Case, if it ever was. One party can make a witness of the other.

PROOF OF KILLING—NEGLIGENCE.

Independent of any legislation on the subject, we do not think that proof of the mere killing, independent of locality or some other circumstance which shows that it would not have resulted if reasonable care had been taken, or some omission of duty, as a failure to blow the whistle for the purpose of scaring the cattle off, is *prima facie* evidence of negligence upon the part of the company. B. & M. R. *v.* Went, 12 Neb. 76; Schiner *v.* Railroad Co., 40 Iowa, 337; Bathje *v.* Railroad Co., 26 Texas, 604; Walsh *v.* Railroad Co., 8 Nevada, 110; Railroad Co. *v.* Means, 14 Ind. 30; McKissock *v.* Railroad Co., 73 Mo. 590; Railroad Co. *v.* McMillan, (Ohio) 7 Am. & Eng. R. R. Cas. 588; see also 19 Am. & Eng. R. R. Cas. 458, note.

What legislation has now taken place is now to be inquired into.

LEGISLATION AS TO COLLECTING CLAIMS FOR CATTLE.

In the year 1875, "An act to provide means for the collection of claims for cattle and other stock destroyed by railroads" became a law without the approval of the governor. It passed the assembly February 18, and the senate on the 25th of the same month. Its first section enacts "that all railroad companies operating in the State shall be held liable for damages to cattle, horses, or other stock by the cars or trains of such company or corporation, either by killing or maiming animals, and the amount of damages shall be established by affidavit of the owner or some other person acquainted with the stock so killed or maimed. Its second section provides "that damages established as aforesaid may be sued out and judgment obtained in any court having jurisdiction of the amount so established, in the same manner as other evidences of debt." The third section provides for the service of process; the fourth, that all real and personal property of the corporation shall be liable to execution issued in such an action; and the fifth, for garnishment proceedings against a depot agent.

If the purpose of this act was to create an absolute liability upon

the part of railroads independent of any question of negligence, (which we are not satisfied can be done; Macon & Western R. Co. *v.* Davis, 13 Ga. 68; Zeigler *v.* Railroad Co., 58 Ala. 594), then the title of the act is not sufficient to support this purpose, but is too constrained. It is confined by its words to providing means for collecting claims having at its passage a status in law, or similar ones to raise in the future, and excludes the idea of making that a claim which without it would not be one. Carr *v.* Thomas, 18 Fla. 736; 13 Ga. 86.

If it be the plain meaning of the first and second sections that the affidavit provided for is to be taken as conclusive evidence of the damage or of the "amount" thereof, and that, upon such affidavit as an evidence of debt, the action may be instituted and judgment obtained without right upon the company's part to be heard as to negligence and the amount of damages, or as to either, then they do not provide due process of law and cannot stand. Cooley Const. Lim. 432.

To establish, according to Webster, means to make stable or firm; to fix or set unalterably; to settle or confirm; to enact or decree by authority or for permanence; to decree; to enact; to ordain,—said of laws, regulations and the like; to settle or fix,—as anything wavering or doubtful or weak. Worcester's definition is not materially different. The plain meaning of the language used in the first section is that the affidavit should fix, set unalterably, settle, make stable or firm the amount of the damages, and the second section in no wise qualifies this meaning. By the latter it is provided that the damages established by the affidavit, the amount of the damages thus fixed or unalterably settled,—damages, the amount which is settled by the affidavit as permanent evidence—may be sued out and judgment obtained in the same manner as other evidences of debt. The provision that the suit shall be in the same manner as other evidences of debt cannot be construed as qualifying the effect previously given to the affidavit, but only as intended to provide that the action should be brought on the affidavit as an evidence of debt, the settled character of the evidence being previously fixed. If, however, we construe the second as qualifying the first section so far as the character of the evidence is concerned, then all the rules of pleading and evidence which obtain in the case of actions on other evidences of debt will apply, and a proper plea upon the part of the company, denying the debt, will cast on the plaintiff the burden of proving everything necessary to constitute the debt, including negligence, and leave the statute without any effect upon the ordinary rules of pleading and evidence.

After the most careful consideration we are capable of giving the subject, we have come to the conclusion that the meaning and purpose of the statute are to make the affidavit conclusive evidence of at least the amount of the damages, and that no other

construction can be placed upon it without ignoring the plain meaning of the language used, and constructing ourselves something which the statute does not sustain.

The legislature cannot thus create judgments, even as to the single element of the amount of the damage upon the basis of an *ex-parte* affidavit, nor as to such element and those of the killing or injury and negligence.

It is within the power of the legislature to provide that proof of the killing or of damage to live stock by railroad engines or trains shall be *prima facie* evidence of negligence on the part of the company or person operating them, as has been wisely done in some States, in view of the fact that the company always has witnessed the killing or injury; and it may also require railroad companies to fence the tracks, and as a penalty for not doing so subject them to payment for all stock killed or injured, even to double the amount of the value or injury. Jones *v.* C. & U. River R. Co., 16 Iowa, 6; Mo. Pac. R. Co. *v.* Henner, 115 U. S.

We think the demurrer to the declaration should have been sustained, and that the court erred in charging the jury as to the killing being made *prima facie* evidence and in refusing the instructions numbered 2 and 7 requested by the defendant, but that it did not err in refusing the instruction numbered 2, as it uses the word wilful, or in refusing that numbered 4, nor that numbered 6, as it is too broad.

The judgment is reversed, and the case will be remanded with directions to sustain the demurrer to the declaration, with leave to the plaintiff to amend the declaration and for further proceedings in accordance with this opinion.

BLANFORD

v.

MINNEAPOLIS AND ST. LOUIS R. CO.

(*Advance Case, Iowa. March* 11, 1887.)

A railroad corporation has not the right to fence its track in cities and towns, where it is intersected by streets and alleys, notwithstanding the language of the statute (Code Iowa, §§ 1268, 1288), requiring fencing where the road passes through unimproved land, or where the same person owns the land on both sides of the track. BECK and REED, JJ., dissenting.

APPEAL from circuit court, Boone county.

Action to recover under the statute double the value of a cow killed by a train on the defendant's road, at a point where it had

the right to fence its track. It is also stated in the petition that the train was carelessly and negligently operated. Trial to the court; judgment for the plaintiff; defendant appeals.

A. E. Clarke for appellant.

Crooks & Jordan for appellee.

SEEVERS, J.—Certain facts were stipulated and agreed upon, among which were the following: "The plaintiff's cow, while at large in the streets of the incorporated town of Ogden, at a point where the town was platted and laid out in blocks, streets, and alleys, was struck and killed by defendant's train, where the defendant's road crosses one of the lots of said town."

The amount in controversy being less than $100, we are required to determine the following question: "Has a railroad corporation FACTS. the right to fence its track and right of way when the same passes over or across a town lot or block, 264 by 574 feet, being a portion of the territory embraced in and within the corporate limits of an incorporated town which is laid out and platted in streets and blocks?"

We are unable to determine, from the facts stipulated and the foregoing question, whether the lot or block is all owned by one person, or by several, or whether the road crosses it for the distance of 574 or only 264 feet. We incline, however, to think it is immaterial what the facts are in the respects mentioned. We will therefore assume that the lot in question is owned by one person, and the road passes across it at a right angle, for the longest distance mentioned. While this assumption is made, it is obvious that in some other case it may appear that the blocks are, say, 250 feet square, divided into lots of 25 feet, each of which is crossed by the road for that distance, and each lot is owned by a different person. If this makes any difference, and each case must be decided according to the facts shown in the record, then it would seem to be a question for the jury, under proper instructions from the court, as to whether the right to fence existed; that is, whether the railroad company had such right. We, however, are asked to determine the question propounded as a matter of law, and such it has been assumed to be in numerous decisions of this court, and such we believe it to be, and such question we think may be stated as follows: whether a railroad company has the right to fence its track within the corporate limits of a city or town, outside of or beyond the switches and depot grounds, but within that part of the corporate limits where the track is intersected by streets and alleys. We assume that outside or beyond where there are any streets, and where the land is used for agricultural purposes, although within the corporation, the right to fence exists. Coyle *v.* Chicago, M. & St. P. R. Co., 62 Iowa, 518, 17 N. W. Rep. 771.

Assuming, then, that the question to be determined is correctly

stated, it is immaterial whether the lot or block is crossed by the road for the distance of 250 or 600 feet, and whether it is owned by one or many persons. The real legal question is whether the right to fence exists within the corporate limits, as above limited and defined. If it does, then cattle-guards must be constructed on both sides of each street and alley, for the reason that the fence would not prevent stock from getting on the track without such cattle-guards. Mundhenk *v.* Central Iowa R. Co., 57 Iowa, 718, 11 N. W. Rep. 656.

It is provided by statute that, when a person owns land on both sides of a railway, the corporation may be required to construct a cattle-guard and causeway, and the corporation also is required to construct cattle-guards where the railway enters or leaves improved or fenced land. Sections 1268, 1288, Code. Does this statute apply to lots and blocks in towns and cities? As there are no restraining words, such a construction could be placed thereon with as much propriety as the theory adopted by the circuit court in relation to the right to fence. The corporation is not required to fence, but, if it fails to do so, it is absolutely liable for stock injured or killed. Code, § 1289.

DUTY TO BUILD GUARDS.

There are no exceptions, and it is immaterial where the stock is injured or killed. But it is evident the corporation does not have the right to fence across highways. There is clearly one other exception,—it does not have the right to fence its depot grounds; and it makes no difference, we apprehend, whether such grounds are within a city or town, or not within either. Davis *v.* Burlington & M. R. Co., 26 Iowa, 550. The question under consideration was elaborately considered in the cited case, and, while the precise question under consideration was not in the case, yet it is evident that it was in the mind of the court, and was considered. Among other things, it is said in the opinion: "The fitness or propriety of fencing a road, we need hardly say, depend upon circumstances. . . . The legislature had in mind, beyond question, those lines as they were constructed over our prairies, knowing that cattle were free commoners, and desiring to protect stock running at large so generally in the agricultural districts of the State." The opinion, as a whole, clearly conveys the impression that it was written with the view and intended to determine two other cases then pending, in which the facts were different. Those cases are Rogers *v.* Chicago & N. W. R. Co., 26 Iowa, 558, and Duran *v.* Same, Id. 559. In the former the following instruction was given: "That, if the horse was killed in the town of Oxford, but not on the depot grounds, or within the switches, and not on any street crossing, and the road was not fenced, the verdict should be for the plaintiff for double the value." And an instruction embodying the proposition that the company would not be liable, under the statute, for failure to

FENCES AT DEPOTS.

fence within the limits of the town situated and traversed by the road, as this was, being refused, there was a verdict for the plaintiff. The court said: "In principle, this case is on 'all fours' with that immediately preceding (Davis *v.* Burlington & M. R. Co.). The argument made we will not repeat. Following the construction there given of the statute, the judgment is erroneous."

When the foregoing cases are carefully considered, we think it is evident this court is committed to the rule that a railroad corporation does not have the right to fence its track in cities and towns where it is intersected and crossed by streets and alleys. The question we are required to determine must therefore be answered in the negative.

The circuit court saw fit to propound another question, and that, in substance, is whether the defendant is liable on the ground of negligence. Inasmuch as the court rendered judgment for double the value of the cow, this question is immaterial, and only presents for determination an abstract proposition, and therefore we are not required to consider it.

Reversed.

BECK, J. (dissenting).—Under the decisions in this court, a railroad company may fence its track whenever it is "fit, proper, and suitable" to do so, and the right rests upon the public convenience, the public interest, and not upon the convenience of the railway company. This rule has been applied by this court to cases wherein was involved the right to fence depot grounds and a strip of land adjacent to a railroad track, "designed to afford room for teaming and driving" on each side of the track. Davis *v.* Burlington & M. R. Co., 26 Iowa, 549; Rogers *v.* Chicago & N. W. R. Co., Id. 558.

This court has not held that a railroad company has not the right to fence the track within the limits of a town or city, when the public interest and convenience do not prohibit it. Gilman *v.* Sioux City & P. R. Co., 62 Iowa, 299, 17 N. W. Rep. 520, and Coyle *v.* Chicago, M. & St. P. R. Co., Id. 518, are claimed by counsel to so hold, but they are not to that effect.

The mere fact that a lot, containing nearly four acres (the lot in question being that size), is within a town or city, does not authorize the conclusion that the interest and convenience of the public do not demand that a railroad running through it should not be fenced. Indeed, it may be that a fence, in such a case, is more urgently demanded by the public good than in case of farming lands away from towns and cities. It will be observed that the facts shown by the question submitted in this case disclose that the railroad runs "over and across" the town lots, not upon a street or road adjacent thereto. The foregoing opinion, while admitting that the rule it approves has not been held by this court, declares

that it was in the "mind" of the court, and therefore recognized in Davis *v.* Burlington & M. R. Co., 26 Iowa, 550. We cannot fathom the "mind" of the court in order to determine the rule of law decided, nor can we consider the arguments advanced in the discussion by the court to determine the point decided. We look to the facts, and, if we discover the point was not in the case, whatever is said about it is not to be regarded as a decision; it is mere *dictum*. The foregoing opinion admits what is true,—that the question before us was not in the case cited. It is therefore no authority in this case.

A doubt may be well expressed as to whether the point in controversy in this case was "in the mind" of the court in the case cited, and whether any arguments found in it will support the conclusion reached in the foregoing decision.

REED, J., concurs in the dissent.

Duty to Fence Stations and Yards.—It has been held that railway companies are not required to fence their track at stations and sidings where freight or passengers are received or discharged, and are not liable to pay for cattle or other animals which may wander upon the track at such places, and be killed without negligence on the part of such companies. Indianapolis & C. R. Co. *v.* Oestel, 20 Ind. 231; Jeffersonville, M. & I. R. Co. *v.* Beatty, 86 Ind. 15; Indianapolis & St. L. R. Co. *v.* Christy, 43 Ind. 143; Pittsburg, C. & St. L. R. Co. *v.* Bowyer, 45 Ind. 496; Ohio & M. R. Co. *v.* Rowland, 50 Ind. 349; Indianapolis, P. & C. R. Co. *v.* Crandall, 58 Ind. 365; Cincinnati, R. & Ft. W. R. Co. *v.* Wood, 82 Ind. 593.

Railroad Companies—Fences—Killing Horses—Depot Grounds in Town.—In an action against a railroad company for damages for killing two horses by defendant's train, at a point on its railroad where the road was not fenced, but where the right to fence existed, it appeared from the evidence that the horses were killed at a point on the main line, 140 feet west of the switches or side tracks, at the town of De Soto, Iowa. The right of way south of the track was fenced, as well as a portion on the north side between the place of the killing and the south boundary of the town plat, and cattle-guards were placed at the western boundary of the town about 1000 feet west of where the horses were killed. The depot grounds, switches, and side-tracks were all east of the point where the animals were killed. *Held*, that the place where the horses were killed was not a part of the company's depot grounds used for the convenience of the public; that the duty to fence existed, and hence the company was liable. Payton, Chicago, etc., R. Co., 30 N. W. Repr. 877.

Double Damage Act, Constitutionality of.—The former decisions of the Supreme Court of Missouri, upholding the constitutionality of the double damage act, as regards both the constitution of this State and of the United States, sustained. Hines *v.* Mo. Pac. R. Co., 86 Mo. 629.

Duty to Fence.—The statute expressly requires defendant to fence unenclosed lands; and the facts that the mare which was injured by the cars strayed away from plaintiff's premises, got upon the commons, and thence found its way through the gate on the road, constitute no defence. Duncan *v.* St. Louis, etc., R. Co., 8 West Repr. 282.

Failure to Maintain Fences—Knowledge of Defects by Plaintiff.—Where a railroad company knows, or by the exercise of reasonable diligence might have known, of defects in its fences, required to be kept in repair, and fails

to make the necessary repairs within a reasonable time after the acquisition of such knowledge, or after such knowledge should have been acquired, it is liable for damages resulting from such failure or neglect. Plaintiff will not be precluded from recovery because of the fact that he knew of the defects in the company's fence, before the injury, and did not repair them. Wilson *v.* St. Louis, I. M. & S. R. Co., 87 Mo. 481.

Killing Stock—Evidence of Employees in Charge of Train—Weight Attached to.—Gen. St. Ky. c. 57, § 5, making the killing or damaging of stock by a railroad *prima facie* evidence of carelessness and negligence on the part of the road, *held*, where, in an action to recover damages for such killing, the employees in charge of the train make plain and uncontradicted statements as to the fact and cause of the killing, the statute does not raise the presumption that they testified falsely, but their evidence is to go to the jury to determine whether it is sufficient to rebut the *prima facie* evidence of negligence created by the statute. Grundy *v.* Louisville, etc., R. Co., 2 S. W. Repr. 899.

Killing Stock—Verdict for Railroad Not Disturbed.—In an action against railroad for negligent killing of stock, where, from the evidence of those in charge of the train as to the fogginess of the morning, speed of the train, and curve in the road, it is plain the killing could not have been avoided, and the evidence introduced by plaintiff is all of a negative character, the court of appeals will not disturb a verdict relieving the road from negligence. Grundy *v.* Louisville, etc. R. Co., 2 S. W. Repr. 899.

Killing Stock—Failure to Have Air-brakes.—In an action against railroad for negligent killing of stock, the fact that the train had no air-brakes is not of itself sufficient to charge the road with responsibility for the loss. Grundy *v.* Louisville, etc., R. Co., 2 S. W. Repr. 899.

Killing Stock—Instruction.—In an action against a railroad company for damage to plaintiff's cows, caused by their getting on defendant's track at or near a farm crossing, brought for double damages under the Missouri statute which makes defendant liable for double damages done by its cars, etc., to cattle on the road, or by reason of escaping from or coming on the inclosure, "occasioned, in either case, by a failure to construct or maintain fences," an instruction by the court which, after defining a legal fence, tells the jury that, if the cows got upon the track at a place where defendant failed to maintain a lawful fence, or at a necessary farm crossing, where defendant had failed to erect and maintain a gate of the height prescribed by statute, with a latch and hook, and were killed by defendant's cars, then the verdict should be for plaintiff, is erroneous for not containing the element that the cattle were damaged by reason of the failure of defendant to maintain a fence or gate of lawful height, or to have the gate hung with a latch or hook. Montgomery *v.* Wabash, etc., R. Co., 2 S. W. Repr. 409.

Negligence—Evidence.—In an action against a railroad company for injury to a mule by a moving train, the fact that a clump of bushes was growing on the defendant's right of way, behind which the mule was standing till frightened onto the track by the approach of the engine, is not material to the question of negligence. Kansas City, etc., R. Co., *v.* Kirsey, 3 S. W. Repr. 190.

Killing Stock—Evidence.—In a common-law action against a railroad for negligently running over and killing a cow, it is competent for the plaintiff to prove that the train was running in excess of the speed permitted by an ordinance of the town in which the killing occurred. Robertson *v.* Wabash, etc., R. Co., 87 Mo. 119.

Killing Stock—Jurisdiction—Justice of Peace.—In an action brought before a justice of the peace against a railroad for double damages for killing stock, the fact that the killing occurred in the township where the suit

was brought, or in an adjoining township, is a jurisdictional one. It is not sufficient that such jurisdictional fact be averred in the statement; it must also be shown by the evidence. Proof simply that the killing occurred within the corporate limits of a town is not sufficient to warrant the jury in finding that it occurred in the township charged in the statement. Backenstoe *v.* Wabash, etc., R. Co., 87 Mo. 492.

Animals—Trespassing on Inclosed Ground.—Gen. St. Ky. c. 55, art. 1, § 2, providing that, if cattle trespass on grounds inclosed by a lawful fence, the owner of the cattle shall be liable for damages done by them, *held*, it is immaterial that the owner of the stock did not keep them in a fenced inclosure; the question on which his liability depends is whether the land on which the trespass was committed was fenced. Louisville, etc., R. C., *v.* Simmon, 3 S. W. Repr. 10.

Stock Breaking Down Fence.—Gen. St. Ky. c. 57, § 4, making railroads liable for stock killed by negligence of passing trains, *held*, if stock are killed by such negligence, it is immaterial that the railroad track was inclosed by a lawful fence, which the stock broke through; the railroad is liable. Louisville, etc., R. Co., *v.* Simmon, 3 S. W. Repr. 10.

Railroads—Liability of Owner of Stock Killed—Wrecking of Train.—Where stock trespassing on a railroad track are killed by a passing train, which is also wrecked, the railroad company cannot recover of the owner of the stock damages sustained by the wrecking of the train, as a counter-claim, in an action by the owner of the stock to recover damages. Louisville, etc., R. Co. *v.* Simmon, 3 S. W. Repr. 10.

Gates—How to be Made.—The law provides that gates shall have latches or hooks; and a rail or stick laid over the top of the gate occasionally is no compliance with the law; and the doctrine that a reasonable time must elapse after the gate or fence gets out of repair, in which defendants may discover its condition, has, in such a case, no application. Duncan *v.* St. Louis, etc., R. Co., 8 West Repr. 282.

Circumstances Showing Place Where Injury Took Place.—Direct evidence that the animal passed through a gap in a fence which the defendant was required to maintain is not required. Where it appeared that the fence had been down for a month or more at a place where the railroad passed along cultivated fields, that defendant had notice of the condition of the fence, and that plaintiff's cattle grazed at that place, *held*, that these circumstances were sufficient from which to deduce the conclusion that the animal got upon the track at a place where the defendant was required to fence, and that the animal got upon the track because of the failure to repair the fence after ample notice.

When it appeared that plaintiff's cattle were seen upon the defendant's railroad track in the forenoon, and the afternoon of the same day blood was seen on the track, with the trace of it leading to a gap in the fence, and the heifer was found dead not more than a quarter of a mile off, with a leg broken, *held*, that there was evidence from which to find the fact that the heifer was injured by the defendant's cars, and that she died from the effects of that injury. Mayfield *v.* St. Louis & San F. R. Co., 3 S. W. Repr. 201.

Place of Injury.—In an action for double damages for the killing of stock, brought against a railroad company under Rev. St. Mo. § 809, the fact that the injury occurred in the township in which the action is brought, or in the adjoining township, as required by Rev. St. Mo. § 2839, must be proved, and in the absence of such proof the defendant is entitled to an instruction in the nature of a demurrer to the evidence. King *v.* Chicago, etc., R. Co., 3 S. W. Repr. 217.

Fences—Gaps in Fence—Injury to Domestic Animals.—In an action against a railroad company for damages for killing two mules, where it ap-

peared that plaintiff was an employee of the railroad company's contractor, and that the mules were used in the construction of a side track and embankment; that the principal track was fenced, but, for the convenience of the contractor and his employees in passing back and forth, two gaps had been made by them in the fence, about 400 feet apart; that between these two gaps was another gap, not used by them, through which plaintiff's mules escaped upon the track, and were injured by defendant's train: *held* that, as the mules escaped upon the track through a gap which the defendant might properly have stopped, the railroad company was liable for the injury if it had knowledge of the gap. Accola *v.* Chicago B. & O. R. Co., 30 N. W. Repr. 503.

Evidence as to Negligence Contradicted—Reversal.—Where in an action against a railroad company for damages for killing an animal, the evidence under the statute is sufficient to raise the presumption of negligence, but such presumption is overcome by the uncontradicted and unimpeached testimony of the witness for defendant to the effect that the killing was an inevitable accident, a verdict and judgment for the plaintiff will be reversed, as being contrary to law and evidence, and the cause remanded for a new trial. St. Louis & San F. R. Co. *v.* Bashan, 1 S. W. Repr. 555.

Complaint—Proof.—A complaint that defendant failed to maintain lawful fences, cattle-guards, gates, and openings, etc., states but one cause of action; and proof of the failure of either, with proof of the other necessary averments, will entitle plaintiff to recover. Duncan *v.* St. Louis, etc., R. Co. 8 West Repr. 282.

Statement under Code.—A statement against a railroad company, under Revised Statutes, section 809, for double damages for killing a cow, which does not allege that she got upon the track at a point where the company was by law required to erect and maintain fences, is insufficient. The statement is defective where it does not allege that the animal got on the track where the same "passes through, along, or adjoining enclosed or cultivated fields or unenclosed lands," or that the killing took place at any such point. Manz *v.* St. Louis, etc., R. Co., 87 Mo. 278.

Pleading.—In an action against a railroad company under the Missouri double damage act for the killing of cattle, a statement of plaintiff's cause of action that fails to allege that the cattle got on the track at a point where the company was by law required to fence, or where the track passed through or along or adjoining inclosed or cultivated fields or uninclosed lands, where by law it was required to fence, is fatally defective. Ward *v.* St. Louis, etc., R. Co., 3 S. W. Repr. 481. See also Asher *v.* St. Louis, I. M. & S. R. Co., 79 Mo. 432; Manz *v.* Same, 87 Mo. 278; Morrow *v.* Missouri Pac. R. Co., 82 Mo. 169; Schulte *v.* Railroad Co., 76 Mo. 324; Hudgens *v.* Hannibal & St. Joseph R., 79 Mo. 418; Nance *v.* Same, 79 Mo. 196; Davis *v.* Missouri, K. & T. R. R., 62 Mo. 441; Cecil *v.* Pacific R. Co., 47 Mo. 246.

Railroad Companies—Fences—Injury to Animals—Pleading—Rev. St. Mo. § 809.—In a suit for damages against a railroad company under section 809, Rev. St. Mo. 1879, for killing a heifer, when the complaint states facts which show that the animal got upon the track of defendant at a point where the defendant is required to fence its road, it is sufficient, and it is not necessary to state that the animal did not get upon the track at a crossing of a highway. Mayfield *v.* St. Louis & San F. R. Co., 3 S. W. Repr. 201.

Averment as to Going on Track.—In an action against a railroad company for damages to stock, the petition alleged, among other things, that the mules injured came upon defendant's track where it passes through uninclosed lands, and where there was no crossing by a public highway. *Held* sufficient to show that the animals got on the track at a point where the defendant was by law required to erect and maintain fences, and that the kill-

ing was not within the limits of an incorporated town. Tickell *v.* St. Louis, I. M. & S. R. Co., 2 S. W. Repr. 407.

Averments and Proof in Action for Killing Mare.—In an action under Rev. St. Mo. § 2124, to recover the value of a mare killed upon a railroad track, it is not necessary to aver in the complaint that it entered the road at a point where the same was, by statute, required to be fenced, or that the injuries were received in consequence of the failure of the defendant to erect fences; but it is sufficient if it be alleged that the defendant might have fenced the road at that point.

In such an action, the statute having given the plaintiff the right to recover "without any proof of negligence," where the accident did not occur on a portion of the road inclosed with a lawful fence, or at the crossing of a public highway, an allegation of negligence on the part of the company does not impose upon the plaintiff the burden of proving it. Radcliffe *v.* St. Louis etc., R. Co., 90 Mo. 127.

Burden of Proof.—In an action against a railroad company for killing a horse, when it is shown that, at the place where the horse entered upon the track and was killed, the road was not securely fenced, the burden of proof is upon the company to show that it was not bound to maintain a fence at that point. Cincinnati, etc., R. Co. *v.* Parker, 9 N. E. Repr. 787.

Killing of Stock—Burden of Proof.—Gen. St. Ky. c. 57, § 5, providing that the killing or damaging of horses or other stock by railroads shall be *prima facie* evidence of carelessness and negligence on the part of the railroad, in an action by the owner of stock against the road for such killing, *held*, it devolves on the road to show that the killing was unavoidable, so that the employees in charge of the train could not have prevented it by the exercise of ordinary care and diligence. Grundy *v.* Louisville, etc., R. Co., 2 S. W. Repr. 899.

Louisville and Nashville R. Co., plaintiff in error,

v.

Yniestra, defendant in error.

(21 *Florida*, 700.)

An instruction which assumes facts alleged therein to have been proven is erroneous and is properly refused.

Negligence on the part of a plaintiff, which contributes to the injury of which he complains is a matter of defence which the defendant must set up and maintain by proof, unless the plaintiff's own evidence in support of his cause of action shows that a presumption of contributory negligence is plainly inferable from said evidence, in which case the burden of proof is shifted, and it becomes the duty of the plaintiff to remove such presumption.

Notwithstanding the fact that a person may be guilty of a negligent act from which injury results to another, yet if the person injured could by exercising ordinary prodence have prevented said injury, or by his own act he contributed to said injury, he cannot recover damages resulting therefrom.

The injury must be solely caused by the negligence of the defendant. It is not enough that it should be essentially so caused.

Ordinarily the question of contributory negligence is a question of fact for a jury under instructions from the court, but when there is no contradiction in the evidence, and the facts are undisputed, and the conclusion and inference to be drawn from it is indisputable, involving only a common instinct of mankind—self-preservation—it becomes a question of law.

When a railroad track by authority of law is laid in a public thoroughfare, the right of the company owning said track to operate trains thereon is superior to the right of the general public to walk along said track, but having a superior right thereon does not relieve the company from liability to damage for injury to persons caused solely by its negligence in using said track.

When a person voluntarily walks on and along the tracks of a railroad laid in a public thoroughfare which he knew was used as a switch-yard on which locomotives were passing to and fro night and day, where the walking on either side of said track was as good as on the track, and in doing so is run over by a passing train and killed, he has by the failure to exercise ordinary care and prudence, directly contributed to his own misfortune, and his representatives cannot recover from the company using said track damages therefor.

WRIT of error to the circuit court for Escambia county.

The facts of the case are stated in the opinion.

W. A. Blount for plaintiff in error.

J. C. Avery and *C. B. Parkill* for defendant in error.

THE CHIEF JUSTICE.—The appellee, Annie E. Yniestra, brought her suit in the above stated county to recover damages from the L. & N. R. Co. for the killing of her husband, Moses G. Yniestra, by an engine and tender operated by the employees of the defendant company. On the trial of the cause it appeared that Moses G. Yniestra on the morning of the 14th day of February, A. D. 1884, was walking on the track of the Pensacola & Atlantic R. Co. There was another track running parallel, at the distance of eight feet, with the one on which Yniestra was found, belonging to the defendant. The two were used in common by the Louisville & Nashville R. Co. and the Pensacola & Atlantic R. Co. for the purpose of a switch-yard, making up trains, etc. The time Yniestra was killed was about the break of day, when, according to the evidence, an object the size of a man could be distinguished fifty or sixty yards. The track was laid in a public street in the city of Pensacola. Yniestra had been in the habit of walking through said switch-yard for about three years. The deceased was forty-seven years of age and a man quick in his movements. The walking between said tracks and on either side of them was good, better than on the track. Engines were switching over the yard continuously both day and night. Just before the killing of Yniestra, the engine which ran over him had gone up the P. & A. track to a switch connecting the tracks of said companies some 300 or 400 feet above where he was killed, and switched onto the L. & N. track.

FACTS.

The engine passed through the switch and backed down the

Louisville track about 500 or 600 feet to a cattle pen, and returned to the switch. Mathena, one of the switchmen, just before the engine got to the switch, saw Yniestra walking down the Pensacola & Atlantic track. He was walking about as fast as a man usually walked. The engine was within six or eight feet of him. Directly afterward Mathena threw the switch, and the engine and tender passed on to the Pensacola & Atlantic track, the one on which Methena had just seen Yniestra walking, and backed down the same some 300 or 400 feet, and ran over and killed him. The headlight of the engine was burning brightly, the bell was ringing, and at the time of the killing the machinery was not working, the engine was merely rolling, about as fast as a man usually walks.

There was no light nor cowcatcher on the rear of the tender. There was no lookout to warn people off the track on the rear of the tender. There were five men on the engine—the engineer, yardman, fireman, and two switchmen.

The wood was piled so high on the tender that the persons on the engine could not see down the track on which they were backing.

There were no witnesses to the killing except the employees of the defendant who did it, and there is no conflict in their evidence. There was a verdict and judgment for plaintiff.

The appellant assigns as error the refusal of the court to give instructions numbered 16, *b* and *c*, asked by appellant's counsel. These instructions are as follows:

16. "The facts in this case show contributory negligence in the deceased, and do not show such negligence by the defendant or its employees, after their discovery of the peril of the deceased, as to authorize a verdict in favor of the plaintiff, and you will find for the defendant."

b. "If you find from the evidence that the place at which the death of Moses Yniestra occurred was used by the defendant as a part of its switch-yard, where the switch-engine and trains were constantly switching backward and forward, and that Moses Yniestra knew this fact, and that he knew that at that time an engine was going backward and forward in said switch-yard near and on both sides of the track on which he had placed himself, and might at any minute back down on said track, and that at night, or when it was dark, he walked along or crossed said track at said point in said switch-yard, that there was good walking alongside of said track, and that he was killed by the engine on said track, the plaintiff cannot recover, unless she proves that the said Moses Yniestra was in the exercise of due care at the time of the accident, or that the employees on the train after they discovered that he was on the track were guilty of recklessness, wantonness, or wilfulness, that caused his death."

c. "If you find from the evidence that the place at which the

death of Moses Yniestra occurred was used by the defendant as part of its switch-yard, where the switch-engine and trains were constantly going backward and forward, and that he knew this fact, and he knew that at that time an engine was going backward and forward in said switch-yard near and on both sides of the track on which he placed himself, and might at any time come down on the said track, and that at night or when it was dark he walked along or crossed said track at said point in said switch-yard, and that there was a good walk alongside of said track, and that he was killed by the engine, the plaintiff cannot recover unless she proves that those persons in charge of fhe engine after they discovered that he was on the track were guilty of recklessness, wantoness, or wilfulness which caused his death."

The appellant also assigns as error the refusal of the court to grant a new trial.

The motion for a new trial was based on the following grounds:

1. The verdict is contrary to law.
2. The verdict is contrary to the evidenc.
3. The verdict is contrary to the charge of the court.
4. The verdict is unsupported by the evidence.

There were other grounds, also, which it is unnecessary to notice here. The evidence has already been set forth. The charge of the court was as follows: "The plaintiff sues the defendant for damages resulting from the killing of her husband, which she alleges occurred through the negligence of the agents of the defendant. In order to sustain her claim she must show that her husband was killed by the defendant's agents and she must show that the killing was by their negligence. The defendant admits that under the ruling of the court upon the question of the right of Moses Yniestra upon the railroad track, the defendant's agents in charge of the locomotive were guilty of negligence. The killing by the agents of the defendant was admitted, but the negligence of the defendant's agents must be proven. If you find such negligence you must find for the plaintiff, unless you find that the plea of defendant, setting up contributory negligence, be true. If Mr. Yniestra was himself negligent, and that negligence was the proximate cause of his death, the law calls that contributory negligence, and the plaintiff could not recover. As to whether the defendant was negligent and whether the deceased was guilty of contributory negligence, that is a matter for you to determine under all circumtances If you find that the defendant's agents were negligent, and that Moses Yniestra was not negligent, then you will find for the plaintiff and assess her damages. In assessing her damages, you will give her compensation for the loss of her husband—the pecuniary loss. You cannot take into consideration the amount which would be required to support her and her children, but simply how much she has lost in his death in a money sense. In estimating

this you must confine yourself to such a sum as paid now will furnish compensation for his loss. If you find, however, that there was no negligence on the part of the defendant or its agents, or that his death happened from his own contributory negligence, you will find for the defendant. It is insisted by the defendant that the deceased was a trespasser on the track of the defendant, and even if the defendants or its agents were negligent, the plaintiff cannot recover. The law upon this point is that the streets of a city belong to the public, and that the public have a right to walk on the railroad track laid on the streets and are not trespassers in so doing, so that the mere fact that the deceased was walking on the track will not prevent a recovery by the plaintiff. If you find for the plaintiff, you will state in what sum you find for her. If you find for the defendant you will simply say: We, the jury, find for the defendant."

The court also, at the request of defendant's counsel, gave to the jury special instructions, designated in the bill of exceptions as 4, 5, 6, 10, and 11, as follows:

4. "In order that you may find for the plaintiff it will not be sufficient for you to find that the deceased met his death by being run over by the engine of the defendant. The defendant is not liable except for the negligence of itself or its employees, and such negligence must be proved by the evidence before you. The mere fact of killing raises no presumption of negligence of the defendant or its employees."

5. "The plaintiff cannot recover unless the deceased was in the exercise of reasonable care at the time of the accident, and if you find that he was not, you must find for the defendant in spite of any negligence which you may find the employees of the defendant in charge of the engine to have been guilty of, unless such negligence was after knowledge of the deceased's carelessness, and an opportunity to avoid the results of it."

6. "The presumption is that the deceased was not negligent, but if it appears from the evidence that the deceased was in a position of peril on the track at the time of the accident, and no explanation which is consistent with due care on his part is given why he was there, the plaintiff fails and you must find for the defendant, unless it appears from the evidence that the accident happened from the negligence or want of ordinary care of the employees of the defendant after they discovered his position of peril."

10. "The employees of a railroad in charge of its train or engine have a right to presume that an adult person walking on the track is in possession of his faculties, and that he will get off to avoid the train."

11. "And the railroad company will not be responsible for an injury to him by the train or engine unless the employees in charge were negligent in not taking proper measures to avoid an injury

to him after they had reasonable cause to apprehend that he would not get off."

All these assignments of error, appellant's counsel states are only insisted on to show contributory negligence on the part of Yniestra.

The first error assigned is the refusal of the court to give the jury instruction numbered "16." A reference to this instruction will show that it required the court to assume and to charge the jury that certain facts were proven, the truth or falsity of which alleged facts it was the exclusive province of the jury to determine. Such a charge was properly refused. Section 1, chap. 1324, Laws of Florida, McClellan's Digest, 338, sect. 34, provides: "That upon the trial of all common law and criminal cases in the several circuit courts of the State, it shall be the duty of the judge presiding at such trial to charge the jury only upon the law of the case; that is, upon some point or points of law, or exceptions to evidence arising in the trial of said cause, and such charge shall be wholly in writing."

ASSUMPTION OF FACTS.

The next error assigned is the refusal of the court to give the jury the instruction, *supra*, 16 *b*.

We apprehend the correct rule to be (altogether there is great conflict in the decisions of courts and in the opinions of commentators) as is insisted by counsel for appellee, that contributory negligence is a matter of defence to be plead and proved by the defendant, but with the qualification that it appears from the plaintiff's own evidence in support of his cause of action that a presumption of contributory negligence by the deceased is fairly inferable from said evidence, the burden of proof is shifted and it becomes incumbent on the plaintiff to remove such presumption. B. & O. R. Co. *v.* Whittacre, 35 Ohio St. 627; Robinson & Weaver *v.* Gray, 28 Ohio St. 241. In Bancroft, Adm'r, *v.* Boston & Worcester R. Co., the court say that under circumstances similar to those detailed in instruction 16 *b* the plaintiff cannot recover "without adequate proof that he took active measures of precaution to guard against accident."

CONTRIBUTORY NEGLIGENCE.

The instruction does not ask that plaintiff should be required to prove that at the time of the accident the deceased was in the exercise of due care, as an independent and unconnected proposition of law, but relatively to the supposed facts which precede it. Those facts, if proven in our judgment were such as would warrant the presumption of want of due care and caution by the deceased in the protection of his person, and made it incumbent on the plaintiff to remove such presumption.

We think the court erred in refusing to give the instruction.

The next errors assigned are the refusal to give the jury the instruction designated 16 *c*, and the refusal of the court to grant a new trial.

We propose to consider this charge which the court refused, and those given by the court and designated in the bill of exceptions as 4, 5, 6, 10, and 11, in connection with the evidence in the case with the view of determining whether the deceased contributed by his want of proper care of himself to his death, and whether it was the duty of the court on the evidence to declare as matter of law that the deceased was guilty of negligence.

The action of the employees in running a locomotive and tender when it was dark along a public street without a light or cowcatcher on the rear of the tender, or a lookout thereon to warn persons off the track, and with wood piled so high on the tender as to prevent persons on the cab from seeing down the track on which they were going, was certainly negligence and deserves the utmost reprobation, and if we were permitted to look at this alone our duty of affirming the judgment of the circuit court would be plain, but the authorities establish beyond controversy, and on foundation too solid to be weakened now by doubt or argument, the doctrine that a person who has been injured in person or property by the negligent act of another cannot recover damages for such negligent injury in a suit therefor if he has in any manner by his own wrong, negligence, or want of ordinary or reasonable care contributed to such injury.

The injury must be "solely" caused by the negligence of the defendant. It is not enough that it should be "essentially" so caused. Grippen *v.* The N. Y. Central R. Co., 40 N. Y. (1 Hand) 34; Central R. Co. of New Jersey *v.* Teller *et al.*, 84 Penn. St. Reps. 226; Railroad Co. *v.* Jones, 95 U. S. 439; Havens *v.* Erie R. Co. 41 N. Y. (2 Hand) 295; Pennsylvania R. Co. *v.* Beale, 73 Penn. St. R. 504; Wilds *v.* Hudson River R. Co., 28 N. Y. (Smith, 10) 430; Salter *v.* Utica & Black River R. Co., 75 N. Y. (30 Sickles) 273; Penn. R. Co. *v.* Bentley, 66 Penn. St. Rep. 30. "When negligence is the issue it must be an unmixed case." Dascomde *v.* Buffalo & State Line R. Co., 27 Barbour, 221; Wilcox *v.* R. W. & O. R. Co., 39 N. Y. (12 Tiffany) 358; Chicago, Rock Island & Pacific R. Co. *v.* Bell, 70 Ill. 102; Telfer *v.* Northern R. Co., 30 N. J. 188; Neal *v.* Gillert, 23 Conn. 437.

The evidence to our mind shows conclusively that the deceased, by voluntarily walking on the track of the railroad when it was known to him that an engine was engaged in switching there night and day, when the walking was equally as good on either side of said track, needlessly assumed a dangerous risk, and directly contributed to his own misfortune. Ordinarily the question of contributory negligence is a question of fact for the jury under instructions from the court, but when there is no contradiction in the evidence and the facts are undisputed, and the conclusions and inferences to be drawn from it are indisputable, involving a common instinct of mankind—self-preservation—it would seem clear

that in such a case contributory negligence becomes a matter of law, and it is the duty of the court to instruct the jury hypothetically that if they believe such evidence to be true that they establish a case of contributory negligence.

The great current and weight of the authority certainly establishes this conclusion. Beach on Contributory Negligence, p. 454, §162; Rorer on Railroads, 1054; Baltimore & Potomac R. Co *v.* Jones, 95 U. S 439.

But it is insisted that the fact that the track of the railway company being laid in a public street where the deceased had a right to walk relieves his act of being on the track at the time of the accident of the presumption of want of due care and precaution which would arise if he were a trespasser on the track. We are unable to perceive the force of this argument. It is not a question as to the exercise of a right, but rather a question as to whether in the exercise of that right at the particular juncture when the accident occurred he was using the necessary precautions for his safety that the law enjoined on him as an indispensable prerequisite to his recovery for the negligent act of the defendant. These questions are separates and distinct, and the question is narrowed down to the simple inquiry, "Was the deceased in the exercise of ordinary care when he was run over and killed?"

In the scores of decided cases for damage to persons when a railway crosses a highway, the question of the right of the party injured to be on the track has never been considered a factor in determining whether the plaintiff was entitled to recover. The only questions in such cases have been of negligence on the part of defendant and contributory negligence on the part of the plaintiff.

In this case there was no necessity for the deceased to walk on and along the track of the railroad. The walking was as good on either side. In the case of crossings there is in addition to the right to cross the track a necessity for doing so when the person crossing has any occasion to go to the opposite side of the track from the one on which he may be. In this, then, the right to cross is less a subject of dispute, and a higher right because the person desiring to cross has no other means of accomplishing his purpose.

Yet in these cases where the right to cross is universally admitted, and the necessity of its exercise is apparent, the question as to the right of recovery for injury has been only one of negligence *vel non*. The cases here cited sustain this view as well as the position that the deceased was not in the exercise of ordinary care in being upon the track at the time of the accident.

In the case of Butterfield *v.* Forerter, 11 East, 60, and which has ever since been regarded as a leading case, where a person was riding along a public street in Derby at a very rapid speed and ran against an obstruction in the street left there by the carelessness of

another, the court say "One person being in fault will not dispense with another using ordinary care of himself."

In the case of Stubley *v.* London & N. W. R. Co., Law Rep. 1 Ex. 13, Bramwell, B., said: "Passengers crossing the rails are bound to exercise ordinary and reasonable care for their own safety, and to look this way and that to see if danger is to be apprehended, and such ordinary care would be sufficient to prevent most accidents, and would have prevented this."

In Grippen *v.* N. Y. Central R. Co., New York (1 Hand) 34, the court say: "If the injured party, by looking up the track in the direction of the approaching train could have seen it in time to avoid the injury, his omission to do so was negligence, and the refusal of the court to so instruct the jury was error."

In Bacon *v.* The Baltimore & Potomac R. Co., 58 Maryland, 182, the court say: "If the deceased did see or hear the approaching train in time and failed to get out of the way, he was certainly guilty of the grossest negligence, and if he did not see or hear it, it must have been because he did not use his senses for his protection, and he was therefore guilty of negligence, and that negligence directly contributed to his death. Central R. Co. of N. Jersey, 48 Penn. St. R. 226. "One who is approaching a railway crossing is not absolved from the duty of looking up and down the track to see whether a train is approaching by the omission to ring the bell or blow the whistle, and if failure to take such precaution contributes to any injury received by him by a collision with trains running on said railroad he cannot recover for such injury." Havens *v.* Erie R. Co., 41 N. Y. (2 Hand) 295.

"The approach by a public road crossing a railroad was particularly dangerous because the railroad from natural and other obstructions could not be seen or the whistle heard. The deceased in approaching the railroad did not stop to listen, and in crossing the road he was killed by the locomotive. Held, that the deceased was guilty of negligence, and his family could not recover damages for his death." Beale *v.* Penn. R. Co., 73 Penn. St. 504.

"One driving in a highway across a railroad is guilty of negligence fatal to an action if he does so without looking for a train, which he would have seen, or listening for signals of its approach which he would have heard in time to have avoided a collision." Wilds *v.* Hudson River R. Co., 24 N. Y. 430.

"It is the duty of a traveller upon a highway approaching a railroad crossing to exercise a proper degree of care and caution, and to make a vigilant use of his eyes and ears for the purpose of ascertaining whether a train is approaching, and if by a proper use of his faculties he could have discovered the approach of a train and so have escaped injury, and failing to do so is injured, he is chargeable with contributory negligence. and cannot maintain an

action." Salter *v.* Utica & Black River R. Co., 75 N. Y. (30 Sickles) 273.

"It is negligence in a traveller crossing a railroad not to stop and look up and down, because he is bound to presume that a train may be approaching." Penn. R. Co. *v.* Bently, 66 Penn. St. 30.

"It should be regarded little short of recklessness for any one to drive upon the track of a railroad without first looking and listening to ascertain whether a moving locomotive is near." Dascombe *v.* Buffalo & State Line R. Co., 27 Barbour, 221.

"When the deceased was killed in attempting to cross a railroad track within the limits of the public highway, and at a public crossing, if it appear that the deceased would have seen the approaching cars in season to have avoided them had he first looked before attempting to cross, it will be presumed he did not look; and by omitting so plain and imperative a duty he will be deemed to have been guilty of negligence which precludes a recovery. A traveller in crossing a railroad track is required to exercise at least ordinary sense, prudence and capacity; which requires that he should use his ears and eyes, so far as he has an opportunity to do so, and a failure to do this will preclude a recovery in his favor in case of accident." Wilcox *v.* R. W. & O. R. Co., 39. N. Y. (12 Tiffany) 358.

"In view of all the circumstances, the conclusion forces itself upon the mind that the deceased being fully advised of the approach of the train recklessly continued upon the crossing in front of the advancing train, or that, if not so apprised, it was for the want of the simple precaution of looking and listening to find out whether a train was approaching, which would be a lack of common care and caution, and in either event the deceased's own want of ordinary care would have contributed directly to the injury which, under the well-settled doctrine, would preclude a recovery for any damage sustained." C. R. I. & P. R. Co. *v.* Bell, 70 Ill. 102.

"The neglect of the engineer of the locomotive of a railroad train to sound its whistle or ring its bell on nearing a street crossing does not relieve a traveller on the street from the necessity of taking ordinary precaution for his safety. Before attempting to cross the railroad track, he is bound to use his senses—to listen and to look—in order to avoid any possible accident from an approaching train. If he omits to use them, and walks thoughtlessly upon the track, or if, using them, he sees the train coming, and instead of waiting for it to pass undertakes to cross the track, and in either case receives any injury, he so far contributes to it as to deprive him of any right to complain. If one chooses in such a position to take risks he must suffer the consequences. They cannot be visited on the railroad company." Railroad Co. *v.* Houston, 95 United States, 697.

In the case of the C. C. & C. R. Co., 8 Ohio St. 570, it was said by

the court: "When the party injured is an adult of ordinary mental capacity, but partially deaf, her infirmity not being known to the employees of the company will not increase their responsibilities as to care; nor will it excuse her from the full measure of care, which prudent persons partially deaf, but conscious of their infirmity, would ordinarily observe under similar circumstances."

In Zimmermann *v.* Hannibal & St. Joseph R. Co., 71 Missouri, 488, the plaintiff was injured while walking along the track of the railroad laid in a street of the city of Hannibal. The court say: "Here the plaintiff had lived for six years, within a few blocks of where he was injured, was on and over the railroad every day, knew that the passage of the train over the road at any hour was not an impossibility, could have seen the train from the bridge over Bear creek, and if he had not been deaf could have heard it, could have seen it when he walked on the track if he had looked in the direction from which he was approaching, was in his right mind; his visual organs were unimpaired, but he did not look in that direction, and there were but two directions in which he had to look to see an approaching train that could have injured him. He did not look or listen, but recklessly pursued his course upon the track of the railroad, between its rails, when there was ample space north of the track on which he could have walked in safety, and yet it was urged he was guilty of no negligence, but acted just as a prudent man would have acted under the circumstances. If, in such a case, a recovery can be had against a railroad company, the law might be declared in a very few words, that if any man crosses or walks along a railroad track and gets injured, he, or if he be killed his representatives, may sue the company and recover damages; and all the difficulties and nice distinctions as to proximate and remote causes, and contributory and non-contributory negligence, which have so embarrassed the courts would immediately vanish."

In Harlan *v.* Railroad Co., 64 Mo., the court say: "This court has, time and again, decided that it was the duty of every person about to cross a railroad track to approach cautiously, and endeavor to ascertain if there is present danger in crossing, as all persons are bound to know that such an undertaking is dangerous, and that they must take all proper precantion to avoid accident in so doing, otherwise they could not recover for injuries thereby received." See also Lake Shore & Michigan R. Co. *v.* Lovering, 25 Mich. 274, 53 Penn. St. 255; Evans *v.* P. F. & W. & C. R. Co. 28 Am. & Eng. R. R. Cas. 20; Teller *v.* Northern R. Co., 30 N. J. L. 187.

In this case the court say that the blame attaches *prima facie* to the person obstructing the track.

The question which has divided the courts, as to whether the rights of the public are superior, equal, or subordinate to the rights of the company operating such a railway, is one which, in my opinion,

when the motive power, construction, ponderousness, and manner of operating a train are considered, is of easy solution. The fact a person has a right to go upon the railway track, does not justify him in attempting to exercise the right when, from passing trains, it is dangerous to do so, even though such trains are being run negligently and without care, or even when, as some of the cases say, they were being run at a time which was prohibited by city ordinance. The law once permitting locomotives and trains to be run on a track located in thoroughfares, but one result can follow, and that is that they have practically, from their inherent incidents and characteristics, the superior right on their own track, whatever ingenious legal refining may be expended on the subject.

Unlike sentient beings, they have no choice of paths, but are restricted to one single course, already marked out and defined. They can turn neither to the right nor left, to one side nor the other, nor can they be stopped when in motion from their frequently fatal track with the abrupt suddenness that any sentient being can exercise, and which is so often the only method of preventing a fatal catastrophe.

I feel constrained to say in conclusion that in my opinion, and speaking for myself individually, the operation of the principle of contributory negligence is unjust and inequitable. By the law, as it unquestionably stands, no matter how negligently or with what amount of care trains are run, if a person injured by one of them has failed to exercise care on his part, he cannot recover. As it happens in nearly every instance of collision, if not all, that the person on the track is alone injured or killed, the train receiving no damage, there is no present incentive of personal safety on the train hands to use caution, nor a fear of being compelled to make pecuniary compensation when they can rely upon being absolved from their admitted negligence by some careless act of the plaintiff. The law says you were both at fault, and draws from that premise the conclusion that one alone must bear all the damage, provided that one is the plaintiff. If that damage were in some instances inflicted on the train, and in some on the person on the track, and not, as is almost invariably the case, on the latter, the hardship would not be so apparent, and railroad companies would not have, as they do now, a monopoly of the defence called contributory negligence.

Various reasons have been given by judges and commentators in justification of this, to my mind, narrow rule—that it is required by public policy, that the injury was of the plaintiff's own producing, and that the "law has no scales to determine in such cases whose wrong-doing weighed most in the compound that occasioned the mischief." In another branch of jurisprudence these reasons have not been found potent, its "scales" seem better adjusted, and from the same premises of both plaintiff and defendant being in

fault is drawn the more rational conclusion that the damage must be equally apportioned between them. This rule in admiralty courts has so commended itself that by act of Parliament (36 & 37 Victoria), is made the rule of the other courts in like case, where it used not to be. The law, in cases at least where human life is concerned, certainly needs legislative revision.

Judgment reversed and new trial granted.

Union Pacific R. Co.

v.

Fray.

(*Advance Case, Kansas. November* 5, 1886.)

Where a duty is imposed by a railroad company upon one of its employees, and afterwards another duty is assigned to him by his employer, without expressly relieving him from the performance of the first duty, the question whether the assignment of this second duty relieves him from the performance of the first duty is a question of fact, to be submitted to the jury upon the evidence, and is not a question of law.

A conversation between two employees of a railroad company concerning a past transaction is incompetent evidence, as against the railroad company, to prove such transaction.

In an action brought by an employee against a railroad company for injuries resulting from alleged negligence, evidence was introduced tending to show that a duty was imposed by the railroad company upon such employee, and afterwards another duty was assigned to him by his employer, without expressly relieving him from the performance of the first duty, and he could not act in the performance of both duties at the same time; and evidence was also introduced tending to show that he might have performed both duties by attending to one, and then to the other, alternately; and that he failed in the performance of one of such duties; and that, by reason of such failure, the injury for which he sued the railroad company resulted. *Held*, that an instruction by the court to the jury, in substance, that if, at the time of the injury, the plaintiff was in the discharge of the duty which he in fact performed, he might recover, notwithstanding the fact that he failed to perform the other duty, is misleading and erroneous.

Where special questions of fact are submitted to the jury for their answers, it is erroneous for the court to instruct the jury that, "in case no evidence can be found bearing upon the question required to be answered, the jury will say, 'Don't know;' or, 'cannot answer from the evidence.'"

In such a case, where the jury answer eight of such questions by simply saying, "Don't know," and the questions are material, and there was some evidence introduced on the trial applicable to all of them, and the court refused to require the jury to answer these questions in a proper manner, *held* error.

Error from Wyandotte county.

J. P. Usher and *Charles Monroe* for plaintiff in error.

R. P. Clark and *N. Cree* for defendant in error.

VALENTINE, J.—This case has once before been in this court. Union Pac. R. Co. *v.* Fray, 31 Kan. 739; s. c., 3 Pac. Rep. 560, and 15 Am. & Eng. R. R. Cas. 158. After the former decision, the case was returned to the district court, where it was again tried before the court and a jury, and the jury found a general verdict in favor of Fray, who was the plaintiff below, and against the railroad company, which was the defendant below, and assessed the damages at $4000, and also made several special findings of fact; and upon this general verdict, and these special findings of fact, the district court rendered a judgment in favor of Fray, and against the railroad company, for the amount of the general verdict, and costs; and the railroad company, as plaintiff in error, again brings the case to this court, and again seeks a reversal of the judgment of the court below.

FACTS.

The evidence introduced on the second trial is very similar to that introduced on the former trial. There are some differences, however, which we may maintain as we proceed with this opinion.

The foundation of the plaintiff's action is the alleged negligence of the defendant railroad company in failing to provide and maintain a safe and sufficient derrick, with sufficient ropes and other appliances, for the safe handling of stone in building a culvert for the defendant on its line of railroad in Wyandotte county, Kansas, at a point known as "Deep-hollow Bridge," near a station on the line of the company's railroad called "Tiblow." Samuel Mallison was the railroad company's general superintendent in building the culvert. William Ulrich was the overseer or foreman of the work, under Mallison, and John Nelson and the plaintiff, Frey, were laborers, handling the derrick, and performing such other duties as might be assigned to them by either Mallison or Ulrich. This derrick was used in removing stone from a platform near the derrick to a place about 40 feet below, where the stone was used in constructing the culvert. In operating this derrick, a rope, usually called a brake-rope, was used, a portion of which was wound around a pinion-shaft. This pinion-shaft, from friction produced in some manner not shown by the record, would become heated whenever it was used, unless water at such times was constantly poured upon it, and, when allowed to become heated, it would burn or char the brake-rope, so as to render it frail, weak, and unsafe. If, however, water was poured upon the brake-rope and pinion-shaft while the derrick was being operated, and if occasionally, when the brake-rope became worn, a new one was put in its place, there was no danger in operating the derrick. In the present case there seems to have been negligence in not keeping the brake-rope and pinion shaft wet, and in allowing the brake-rope to become burnt and charred, and partially worn, before removal, so as to render it unsafe, whereby it broke, and caused portions of the derrick to break, and thereby caused the

injuries of which the plaintiff complains, and for which he seeks damages in this action.

It seems to be admitted by both parties that there was negligence in this respect. But the parties differ as to who was guilty of the negligence. The plaintiff claims that it was principally, if not entirely, the negligence of Ulrich, while the defendant claims that it was wholly the negligence of Fray and Nelson, and principally the negligence of Fray himself. In all probability, Ulrich, Fray, and Nelson were about equally guilty of the negligence that caused the injuries complained of. The plaintiff claims that the defendant is liable for the negligence of Nelson as well as of Ulrich, as Nelson was one of the defendant's servants; but the defendant claims that the plaintiff is liable for the negligence of Nelson for the following reasons: The railroad company claims that the duty of keeping the brake-rope and pinion shaft wet, and of seeing that the brake-rope was at all times safe, and in proper condition, was imposed particularly upon the plaintiff and Nelson, jointly and severally; that they worked together at and near the derrick; and that it was their duty jointly, as well as severally, to watch the derrick, the brake-rope, and the pinion shaft, and to see that at all times the brake-rope was safe and in good condition.

On the second trial an effort was made by the plaintiff to show that the brake-rope became unsafe from wear alone, and that it did not burn or char; but we think the effort was a failure. There was also an effort made on the part of the plaintiff to show that although the duty of keeping the brake-rope and pinion-shaft wet was at one time imposed upon the plaintiff, or the plaintiff and Nelson, by Mallison or Ulrich, or both, yet that the plaintiff was afterwards relieved from such duty, and assigned to another by Ulrich. Whether this was so or not is one of the principal questions, if not the main question, in the case; and this question, under the evidence, is one of fact, and not one of law. On the part of the defendant, an attempt was made to show that the duty of keeping the brake-rope and pinion-shaft wet was imposed upon Fray and Nelson by Mallison, and that Ulrich not only did not attempt to relieve them from such duty, but that he had no power to do so if he had so attempted. As Ulrich, however, was the foreman of the work, and as Fray and Nelson worked under him, we would think that the attempt to show that Fay and Nelson had the right to work independently of him, or to violate his orders, was a failure.

As between Fray and the railroad company, we would think, from the evidence, that Ulrich had the power to assign Fray and Nelson to other and different duties, and to relieve them from the duty of keeping the brake-rope and pinion-shaft wet. The only question, then, in this regard is whether he did in fact relieve Fray from the duty of keeping the

ASSIGNMENT OF DUTY.

brake-rope and pinion-shaft wet. He did not expressly so relieve him, but whether he did so impliedly is the question to be considered. This, as before stated, we think is the main question involved in the case; and, under the evidence, is purely a question of fact and not one of law, and therefore we do not thinkthat we can decide it as a question of law. Really, the only question which we can determine is whether this question, and the other questions of fact involved in the case, were fairly submitted to the jury, and fairly tried by them. The defendant claims that they were not. It claims that improper evidence was admitted, that improper instructions were given, that proper instructions were refused, that the jury refused to answer proper questions of fact which had previously been submitted to them, and that the court below refused to require the jury to answer such questions. Whether the foregoing errors were in fact committed or not we shall now proceed to consider.

The first claim of error is that the district court erred in permitting testimony of a conversation had on the next day after the accident, between John Nelson and Samuel Mallison, to be introEVIDENCE. duced in evidence. This conversation was concerning matters which transpired on the day of the accident, and which tended to prove negligence on the part of Ulrich. It was concerning past events, and although it occurred between persons in the employment of the defendant, still it was pure and simple hearsay testimony, and not admissible under any rule of law. The authorities cited by the defendant in error are not applicable. It is possible, however, under the other facts and circumstances of the case, that this error is immaterial; but whether it is or not we need not now determine.

It is next claimed that the court below erred in refusing to give certain instructions, and in giving certain other instructions. We think the court below did so err. We shall now assume that Ulrich and Nelson were guilty of negligence for which the railway company is responsible, and that their negligence was so clearly and conclusively shown by the evidence that any errors of the court with respect thereto are wholly immaterial. But still, the principal question presented to the court below was whether the plaintiff was guilty of contributory negligence or not, which question was one of fact for the jury; and the principal question now to be determined by this court is whether that question was fairly submitted to the jury or not for their determination. We hardly think it was. From the evidence introduced, the duty of keeping the brake-rope wet was, at one time, imposed upon the plaintiff, among others; and also, from the evidence, it is probable that if the brake-rope had been kept wet it would not have broken as it did, and the accident would not have occurred. It is also in evidence that the further duty of giving and receiving signals was

INSTRUCTIONS.

also imposed upon the plaintiff; and, in giving and receiving such signals, it was necessary for the plaintiff to stand on the edge of the platform, a few feet from the derrick, but so far away from the derrick that he could not, while there, pour water on the brake-rope; neither could he give nor receive signals while pouring water on the brake-rope. In other words, he could not perform both duties at the same time. This, we think, has at all times been conceded by the parties, and at no time has any question with reference thereto been raised by either party. This accident occurred while the plaintiff was on the edge of the platform for the purpose of giving and receiving signals. But although the defendant concedes that both duties could not have been performed precisely at the same time, yet it claims that the plaintiff could have easily performed both duties by first attending to one, and then to the other, alternately; that is, he could have first wet the brake-rope, and then attended to the other duty, and then wet the brake-rope again, and so on, without any difficulty. The defendant claims that, even after the employees had commenced to remove a stone for the purpose of letting it down to the place where it was to be put in the culvert, the plaintiff could have stepped to the derrick and poured water on the brake-rope, and then have stepped back to the edge of the platform to receive and give signals; that the performance of one of these duties would not at all have interfered with the performance of the other; and considerable evidence to this effect was introduced on the trial, but it does not appear that the court below charged the jury sufficiently with respect to this aspect of the case. The court refused all the instructions asked for by the defendant upon this subject, and, indeed, upon every other subject, and gave only its own instructions. Among these instructions given are the following:

"(20) . . . But if the jury further find and believe from the evidence that after said order [to keep the brake-rope wet] was given by said Mallison to said plaintiff, that one Ulrich became foreman, with authority to superintend and direct work for defendant, and that said Ulrich had assigned other duties to the plaintiff, and at the time of the alleged injury occasioned by the breaking of the said brake-rope, and prior to and at the time of said alleged injury, the plaintiff, in obedience to orders of Ulrich, was in the discharge of other duties than wetting said rope, he was bound to discharge such other duties (if the jury find he was assigned to other duties); and if it appears the plaintiff received the alleged injuries in the discharge of such other duties, under the direction of the foreman,—then the defendant would properly be charged with negligence."

"(24) If the jury believe from the evidence that Samuel Mallison was superintendent of the work, and William Ulrich was overseer or foreman of the work, and that John Nelson and the plain-

tiff were laborers handling the derrick, when the accident occurred; and if the jury further find and believe that William Ulrich, overseer, prior to time of said accident, assigned and directed plaintiff the work and duty of giving signals to other workmen while lowering rock from the derrick platform into the pit below; and if the jury further find that at the time the accident occurred the plaintiff, in obedience to previous directions given by the overseer, was at his proper place, ready and waiting to give the required signals, or in the act of giving such signals,—then plaintiff was in the line of his duty, under the orders of the overseer of the work, at the time of the accident."

"(28) If the jury find and believe from the evidence that plaintiff was charged by both Mallison and Ulrich with keeping the brake-rope wet while lowering rocks, and also charged by Ulrich to give signals to the workmen in lowering the rocks, and if the jury further find and believe that neither of these orders was revoked when the accident happened, then the jury will consider whether the plaintiff at the time of the accident was occupied in giving signals, or pouring water on the rope; and they will further find and consider whether he could perform both duties at the same time; and if the jury find that both duties could not be performed at one and the same time, and if they believe that both could not be performed at the same time, then the jury will find from the evidence to which of these duties he was assigned at and immediately prior to the accident that caused the injury; and if the jury find and believe that at that time he was assigned to and directed to pour water on the rope, and the rope broke, and he was injured on account of his failure to keep the rope wet, then, and in that case, the plaintiff is not entitled to recover. But if the jury find and believe that at the time of the accident the plaintiff was engaged in giving signals or other duties pertaining to the giving of such signals, and in the line of his duty pertaining to such orders, then he could not be charged with negligence in failing to pour water on the brake-rope in lowering the rock."

Now, these instructions are in substance that if the plaintiff had two duties to perform,—one in pouring water on the brake-rope at the derrick, and the other in giving signals at the edge of the platform; and if he could not perform both of these duties at the same time,—and he certainly could not; and if at the time of the accident he was properly at the edge of the platform for the purpose of giving signals,—and probably he was properly at that place at that time; then that he performed his whole duty, and he could not be charged with negligence, although he may have had ample time to have poured water on the brake-rope immediately before he took his position on the edge of the platform. In other words, that if he was performing his duty at the edge of the platform at the very time of the accident,—and perhaps the defendant will

admit that he was,—then that his prior negligence immediately preceding the accident, in not pouring water on the brake-rope, if he was guilty of such negligence, could not affect his right to recover. This cannot be the law. If the rope broke because of his negligence in not pouring water on it a few moments before the accident occurred, it could not make any difference that he was properly performing another duty at the precise time of the accident. If it was the duty of the plaintiff to pour water on the brake-rope prior to his taking position on the edge of the platform, and if the rope broke because he failed to perform this duty, then he cannot recover. The foregoing instructions probably misled the jury.

It is also claimed that the court below erred in giving the following instruction to the jury with regard to the special questions of fact submitted to them for their answers, to wit: "In case no evidence can be found bearing upon the question required to be answered, the jury will say, 'Don't know,' or, 'Cannot answer from evidence.'" We think the court below erred, as is claimed. Kansas Pac. R. Co. *v.* Peavey, 34 Kan. 474, 486; s. c., 8 Pac. Rep. 781, 789.

It is also claimed that the court below erred in refusing to require the jury to answer in an intelligent manner the following special questions, submitted to them at the request of the defendant. The following are the questions, with the answers of the jury: "Question 2. Was the plaintiff instructed by Mallison, acting for the defendant, that there was danger of the brake-rope burning in letting the rock down into place, if the rope was not kept wet?—Answer. Don't know." "Q. 5. If the brake-rope had been kept wet where it wound around the shaft, and the friction occurred, would it have burned?—A. Don't know. Q. 6. Did the plaintiff observe and obey the directions of Samuel Mallison in respect to keeping the rope wet?—A. Don't know. Q. 7. Was not the plaintiff repeatedly warned by Samuel Mallison and William Ulrich, the foreman upon the work, to be careful to attend and see that the brake-rope was kept wet while rock was being lowered by the derrick to the work below?—A. Don't know." "Q. 9. Would the brake-rope have burned if it had been kept wet as directed by Mallison?—A. Don't know. Q. 10. Did any one for the defendant direct the plaintiff not to observe the directions given him by Mallison in respect to keeping the rope wet? If so, name the person, and state what was said.—A. Don't know. Q. 11. Was not the plaintiff provided with a bucket for the water, which he was to use in wetting the brake-rope, and a proper vessel for applying water to the rope? And was not water flowing near by which the plaintiff could get to wet the rope?—A. Don't know, as to the first paragraph. Yes, as to the second. Q. 12. Was not

the brake-rope put on new the day of the accident, or the day before, and was it not of size and strength sufficient for the purpose of controlling the lowering of the rock by the derrick, and was not the only thing needed, to make it safe, to keep it wet, as directed by Mallison?—A. Don't know."

We think the court below erred in refusing to require the jury to answer these questions in a proper manner. The questions are material, and there was some evidence introduced applicable to every one of them.

The judgment of the court below will be reversed, and cause remanded for a new trial.

All the justices concurring.

Evidence—Conversation between Employees Inadmissible.—See Alabama Gt. So. R. Co. *v.* Hawk, 18 Am. & Eng. R. R. Cas. 194; Baltimore, etc., R. Co. *v.* State, 19 Ib. 83; Patterson *v.* Wabash, etc., R. Co., 18 Ib. 180.

HAYDEN

v.

SKILLINGS.

(*Advance Case, Maine. November* 9, 1886.)

The owner of the fee cannot maintain trespass against a section-man on a railroad for cutting and carrying away the hay and grass growing within the lines of the location, under instructions from the general manager and road-master to cut and burn the bushes, grass, and rubbish within his section.

ON report. Judgment for defendant.

E. W. and *F. E. McFadden* for plaintiff.

E. F. Webb and *Appleton Webb* for defendant.

VIRGIN, J.—Trespass *quare clausum* by the owner of the fee
FACTS. for cutting and carrying away grass growing within the located limits of the land duly taken by right of eminent domain and occupied by the Maine Central Railroad.

The defendant justifies as section foreman of the railroad company in executing the instructions of its general manager and road-master to cut and burn the bushes, grass, and rubbish, within his section along the side of its track, to prevent fire from its locomotive spreading upon land of adjoining and adjacent owners.

It is common learning that railroads are of public convenience and

necessity, and that when the corporations cannot purchase the land for their location and use, they may take it by right of eminent domain on payment of the damages legally assessed therefor, which, considering the elements which enter into their estimation, is practically quite equal to the full value of the land. Hence, although such corporations are owned by private individuals, still they are denominated *quasi* public corporations. And in the land so taken they acquire an easement, an incorporeal right only, the fee still remaining in the owner of the land. NATURE OF RAILROADS.

But easements are as various as the purposes to which land and buildings may be applied. They vary as to the mode and extent of occupation according to the particular use to be made of them under the authority by which they are acquired. The character and extent of easements acquired by pewowners in meeting-houses, in land flowed by milldams, in land taken for canals, townways, and highways, are well defined, and the respective rights of the land-owners and of those having the easements have long been settled by numerous decisions of this court, which it is needless to cite here. The mode and extent of the use necessarily "varies not only according to the exigencies of each particular kind, but to the varying circumstances of each species of public work. Brainard *v.* Clapp, 10 Cush. 10. The rights under public easements are commensurate with and include such use and occupation as are directly or incidentally conducive to the free exercise and "full enjoyment of the franchise and the advancement of the public benefit contemplated by the public work." EASEMENTS.

It follows that the easement in lands taken for the purpose of a railroad is obviously vastly different from that in lands appropriated to the various kinds of other public ways. Its propelling power, its numerous freight and passenger trains driven at the high rate of speed demanded by the public, its absolute responsibility for damage to insurable property, real and personal, contiguous to its lines, caused by fire communicated, regardless of all possible care on its part, by its locomotives (Rev. Stat. chap. 51, § 64), or so communicated to materials growing and naturally between its road and property not contiguous, and extending thereto (Pratt *v.* Atlantic & St. L. R. Co., 42 Me. 379), their common law and numerous statute liabilities,—all require that they shall have, as means to meet these responsibilities, the fullest opportunity which the freest use, occupation, and control of the land within its lines can afford, without the intervention of any acts on the part of the landowner which may tend to endanger its trains or otherwise embarrass its use of the easement for the purpose for which its charter was granted. To this end it must have practically the exclusive possession and control of the land within the lines of its location, and the authority to remove therefrom all things growing thereon, the

removal of which it may deem necessarilly conducive to the safe management of its road.

And such is the doctrine held by law-writers and by numerous decisions of courts of the highest respectability in several of the States; among which are the following: Brainard *v.* Clapp, 10 Cush. 10; Hazen *v.* Boston & M. R. Co., 2 Gray, 577, 580; Proprietors of L & C. *v.* Nashua & L. R. Co., 104 Mass. 11, and cases cited; Jackson *v.* Rutland & B. R. Co., 25 Vt. 150; Connecticut & P. Riv. R. Co. *v.* Holton, 32 Vt. 150.

The precise question raised here was decided in a late case in Vermont, and, speaking for the court, Chief Justice Pierpont said:

"If the right to remove the herbage be conceded, adjoining land-owners throughout the State would be found, at the proper seasons, within the lines of the road, with their hired men, tools, and perhaps teams, for the purpose of taking off the herbage, and the detriment to the railroad company and the danger to the trains and passengers would be increased a thousand-fold. The men employed by the land-owners would be likely to be careless, both in respect of being on the track in person and temporarily laying their tools thereon, from which accidents might reasonably be expected to occur; to avoid which a constant and additional degree of watchfulness would be required by the engineers having trains in charge. . . . And under the best management by the railroad company, accidents might be reasonably expected to occur from such causes. In the removal of such causes the railroad companies and the travelling public are greatly interested. Everything which tends to increase the danger of travel upon railroads, public policy requires should be prevented if possible.

"A railroad company should have such sole and exclusive control of the land within the lines of its road as shall enable it so to keep it as to exclude all probability of any accident resulting from any outside interference with such possession."

The grass could have been of but slight value to the plaintiff; but whether it was worth what he estimated it or what the defendant testified, or whether it was harvested or burned on the ground, is immaterial.

Judgment for the defendant.

PETERS, C.J., DANFORTH, LIBBEY, FOSTER, and HASKELL, JJ., concurred.

Removal of Herbage. Trees, etc., by Company in their Roadway.— When a railway company purchases a right of way from an owner of land the fee simple remains in the land-owner, subject only to the uses of the company for railway purposes, and he has a right to the wood, timber, stone, vegetation, and minerals, etc., upon the land, except in so far as they are necessary to construct or repair the road. Chapin *v.* Sullivan R. Co., 39 N. H. 564; Preston *v.* Dubuque, etc., R. Co., 11 Iowa, 15; Baker

v. Johnston, 2 Hill (N. Y.), 342. See, also, Leavenworth, Topeka, etc., R. Co. *v.* Paul, 28 Kan. 816, where the court in considering the right of the land-owner to the use of such land, specifically instructed the jury that "he has the right to every use of it which can be made without interfering with the operation of the road, and to all grass and other vegetation which shall grow thereon."

Redfield in his "Law of Railways," p. 246, § 69, says: "It is certain in this country upon principle that a railway company, by virtue of their compulsory powers, in taking lands, could acquire no absolute fee simple, but only the right to use the land for their purposes. And it is very questionable whether a railway in such case, is entitled to the herbage growing upon the land or to cultivate the same or to dig for stone, or minerals in the land beyond what is necessary for their purposes in construction," etc.

In Adams *v.* Emerson, 6 Pick. 57, it was held that the owner of soil over which a turnpike road was laid out could maintain trespass against the servant of the corporation for taking the herbage.

In Appleton *v.* Fullerton, 1 Gray, 186, it was held that one making an unauthorized use of the land of another over which he has a right of way, is liable to an action, although the owner of the land thereby sustains no actual damage.

A private individual, under the direction of the proper officer, may lawfully cut the grass growing beside the highway, if it impedes the exercise of the right of the public to the enjoyment of the public easement. But the grass belongs to the owner of the fee, and if the person cutting it carries it away, this renders the whole act wrongful, and the person committing it *ab initio*. Cole *v.* Drew, 44 Vt. 49.

The public have no other right, but that of passing and repassing, and the title to the land, and all profits to be derived from it, consistently with and subject to the right of way, remain in the owner of the soil. Stockpole *v.* Healey, 16 Mass. 33; Robbins *v.* Borman *et al.*, 1 Pick. 122; 1 Rolle, Abr., 392.

But a land-owner after his land is legally appropriated for the track of a railway, has no right to enter upon or use such land for any purpose which in the least degree endangers or embarrasses its use for which the railway has appropriated it. And consequently the owner could not enter upon the land to remove turf therefrom, the effect of such entry being to enhance the danger of cattle, etc., getting upon the track. Conn. & Pass. R. Co. *v.* Holton, 32 Vt. 43.

In Brainard *v.* Clapp, 10 Cush. (Mass.) 6, it was decided that the proprietors of a railway have a right to cut the trees growing on the strip of land which they have taken for their road, whether such trees are for shade, ornament, or fruit, and whether such cutting be at the time of laying out their track or afterwards, and there is no burden of proof on such proprietors to show, in their justification, that the trees were cut for the purposes of their road.

In Hazen *v.* Boston, etc., R. Co., 2 Gray, 580, the court said: "The right acquired by the corporation though technically an easement, yet requires for its enjoyment a use of the land permanent in its nature and practically exclusive."

DONOVAN
v.
TEXAS AND PACIFIC R. CO.

(64 *Texas*, 519.)

A railway company has the right to require persons hauling freight from its depot to receive the same on the platform from its servants and not to enter the warehouse for the purpose of checking off the freight; and also to require that persons doing business with the company shall transact the same over the counter, and not enter behind it. Such regulations are reasonable.

It is no ground for damages against the company that a drayman was discharged by his employer, because an agent of the company informed the employer that the drayman would not be allowed to violate proper regulations of the company.

It is the duty of agents of a railway company to enforce the regulations of the company, but not to give reasons why such regulations were made; and if, in giving such reasons, they use actionable language, they, and not the company, will be liable.

APPEAL from Marion. Tried below before the Hon. W. P. McLean.

This suit was instituted by appellant to recover damages from a railway company for having caused his discharge from employment by J. M. De Ware, who owned a line of wagons engaged in hauling freight to and from defendant's depot and warehouse, at Jefferson, and also for defamation of plaintiff's character by the railway company through its agents. It appeared on the trial that plaintiff had charge of the wagons at a salary of $50 a month, and that it was his business to deliver goods at the depot and take shipping receipts for them, and also to haul goods away. An order was issued by the railway company that only its employees should enter the warehouse; that all business should be transacted over the counter, and not behind it, and that freight should be delivered and received at the platform. The agent of the company told De Ware that plaintiff would not be allowed in the warehouse or behind the counter, but gave no reason for it. De Ware was then ignorant of the order of the company and discharged plaintiff, because, as he said: "I had no use for him unless he could go into the warehouse and check out freight, and in the office and settle bills." Plaintiff then tried to prove what the agent of the company had stated was the reason why the railway company had discharged plaintiff from its employment in 1883, but the court would not admit the evidence.

Geo. T. Todd and *Ed. Guthridge* for appellant.

No briefs on file for appellee.

STAYTON, A.J.—That the railway company had the right to make rules requiring that persons engaged in hauling freight from its depot should receive the same on the platform from its servants, and not enter the warehouse for the purpose of there checking off the freight, was a reasonable regulation, as was it that persons doing business with the company should transact the same over the counter instead of entering behind the same.

The charge in this respect was not erroneous.

If such regulations were established by the company as were unnecessary for the proper conduct of its business, and thereby the owners of freight were put to unnecessary delay or expense, they might have their action; but it is not perceived how the plaintiff could maintain an action against the company based on the fact that he was discharged by his employer for the reason that an employee of the company, even in the course of his business, informed the employer of the plaintiff that he would not be permitted to violate proper regulations of the company.

Whatsoever the agents Knote and Now may have said as to the reasons why the plaintiff would not be permitted to go into the warehouses or behind the counters of the company, it surely, under the record before us, cannot be held that the giving of such reasons was within the line of their duties. It was their business to enforce the company's rules, but not to give reasons why they were made.

If they used language in reference to the plaintiff which would be actionable, they would be responsible therefor, but not the company.

The evidence shows that the plaintiff's employer discharged him because the company would not permit him to enter its warehouses there to check off freight, and to enter behind its counters to transact business; this, if not a sufficient ground, under some circumstances might give an action against his employer, but certainly would not against the company.

No other judgment than that rendered could legally have been given, and the judgment is affirmed.

Affirmed.

VOORHEES

v.

CHICAGO, ROCK ISLAND AND PACIFIC R. CO.

(*Advance Case, Iowa. October* 28, 1886.)

Plaintiff, desiring to obtain, on the next day, cars for the transportation of stock, applied to the defendant's station master at O. for the same. There being no telegraph at O., the station master informed the the plaintiff that the cars might not be forwarded in time, and requested him to go to L., a station on another line, managed by the defendants, and asked the station master there to telegraph for the cars. Plaintiff did so, and the station master at L., having telegraphed, afterwards told the plaintiff that he had received a reply, and the cars would be at O. at the desired time. The cars were not sent to O. until two days later than the date on which plaintiff claims they ought to have been forwarded. In an action to recover damages, *held*, that it was beyond the scope of the apparent authority of the station master at L. to make a contract for a shipment from O., and that an instruction by the trial judge directing the jury, if they found the above facts upon a preponderance of the evidence, to return a verdict for the plaintiff, was erroneous.

In an action against a carrier to recover damages for loss of market, evidence of the statements of plaintiff's broker is hearsay, and inadmissible.

Where the court allows a party to introduce further evidence after both parties have rested, it is within its discretion to grant a continuance for the reason that the opposite party's witnesses have left the court.

When the costs of a trial are rendered useless by a continuance, and the continuance is rendered necessary by plaintiff's failure to introduce his evidence at the proper time, the costs are properly taxed to him.

APPEAL from district court, Marion county.

Action for the recovery of damages caused, as plaintiff alleges, by defendant's failure to perform its contract to furnish cars at a specified time for the shipment of a lot of hogs to Chicago. The cause came on for trial at the January term, 1885, of the district court, and, after the parties had each rested, defendant's counsel filed a motion to direct the jury to return a verdict for it. After that motion was argued, and before any order upon it had been entered, the plaintiff asked leave to introduce evidence on a material question which his counsel stated they had overlooked by inadvertence. The court granted leave to introduce the evidence; but, after it had been introduced, defendant's counsel moved the court to continue the cause, alleging, as a ground therefor, that when the parties rested they had discharged their witnesses, who had immediately left the court, and they were consequently not prepared at that term to meet the additional evidence which plaintiff had been permitted to introduce. The court sustained this

motion, and taxed the costs of the term to plaintiff. At the same term plaintiff filed a motion to set this order aside, which at the August term, 1885, was overruled. At that term the cause again came on for trial on the merits, and there was a verdict and judgment for plaintiff. Plaintiff appealed from the order continuing the cause, and taxing the costs to him, and defendant appealed from the final judgment; its appeal being first perfected.

T. S. Wright and *L. Kinkead* for appellant.

Bosquet & Earl for appellee.

REED, J.—On the 16th of October, 1882, plaintiff went to Olivet, a station on defendant's road, for the purpose of making arrangements for the shipment, on the next day, of five car-loads of hogs from that station to Chicago. There was no telegraph office at Olivet, and the station agent informed plaintiff that an order for the necessary cars could not be forwarded by mail in time to receive them for the next day. Plaintiff claims that the agent requested him to go to Leighton, a station a few miles away, and have an order for the cars telegraphed from there, and stated that the agent there frequently ordered cars for Olivet. Leighton is FACTS. on the line of road between Keokuk and Des Moines, while Olivet is on what is known as the "Washington & Knoxville Branch." Both lines are operated by defendant, and they cross each other at Knoxville Junction, a few miles from Olivet and Leighton. The Washington & Knoxville branch has a direct Chicago connection, and it was by that line that plaintiff desired to ship his hogs. He went to Leighton, and, as he claims, informed the agent there that the agent at Olivet requested that an order for the cars be telegraphed from there. The agent accordingly sent a dispatch to the train dispatcher on the Keokuk & Des Moines line, requesting him to send the cars to Olivet in time for the shipment the next day. The name of the Olivet agent was signed to the dispatch, and plaintiff saw it before it was sent. He also testified that the agent afterwards told him that he had received an answer to the dispatch, and assured him that the cars would be at Olivet in such time that the shipment could be made on the next day. He claims that, relying on this assurance, he drove his hogs to Olivet, and was ready to ship at the designated time. The cars were not delivered at Olivet, however, until the 19th, and the hogs were shipped on that day. If they had been shipped on the 17th, they would have arrived at Chicago on the 19th. As it was, they reached there on the 21st. A material decline occurred in the price of hogs in the Chicago market between the 19th and 21st. By this action plaintiff seeks to recover the cost of keeping the hogs from the 17th to the time they were shipped, and the difference between what he received for them when he sold them and the amount he would have received if he had been able to place them on the market on

the 19th. The Olivet and Leighton agents were both examined on the trial. The former denied that he requested plaintiff to go to Leighton, and the latter testified that he did not give plaintiff any assurance that the cars would be at Olivet the next day; and it was proven that the agent at Leighton had no express authority to transact business for defendant except that pertaining to his own station; also that the train-master, to whom said dispatch was sent, had no express authority to send cars to stations on the other line.

1. The district court gave the following instruction to the jury: "If you find from a preponderance of the evidence that plaintiff applied to the station agent of defendant at Olivet for cars in which to ship his hogs to Chicago, such cars to be furnished at a specified time and place, and thereupon such agent informed plaintiff that he could not telegraph from Olivet, and requested him to go to Leighton station, on another branch or division of defendant's railroad, and have the station agent at that station telegraph to the proper authorities for such cars, and you find that plaintiff did request such agent at Leighton to so telegraph, and you find that such agent telegraphed to the train dispatcher of defendant at Keokuk for such cars to be delivered or furnished at Olivet station at a specified time, and thereafter informed plaintiff that he had received a reply to the effect that such cars would be furnished at such specified time and place, and you further find that plaintiff relied in good faith upon such information, and, in pursuance thereof, drove his hogs to Olivet, and had them there ready for shipment at said time, and defendant failed to have such cars there at such time, and you find that plaintiff suffered damage in consequence of such failure, then plaintiff would be entitled to recover the damages, if any, resulting therefrom."

INSTRUCTION.

If defendant is liable on the hypothesis stated in this instruction, such liability must be upon the ground that its failure to have the cars at Olivet at the time in question was a breach of some contract obligation existing between it and plaintiff. Defendant, being a common carrier, is bound to furnish shippers reasonable facilities for the transportation of their property, and would doubtless be responsible to one who had demanded transportation facilities for any damages he may have sustained in consequence of its failure to afford such facilities within a reasonable time after such demand. Plaintiff, however, is not seeking to recover on the theory that there was an unreasonable delay after demand in furnishing the cars, but his claim is that defendant was under obligation to furnish them at a particular time, and that he has been damaged by its failure to furnish them at that time. The doctrine of the instruction is that if plaintiff, at the request of the agent at Olivet, went to Leighton, and requested the agent there to telegraph to the proper officer or agent for the cars, and that agent, acting upon

that request, sent the dispatch, and afterwards stated to plaintiff that he had received an answer to it, and that the cars would be at Olivet on the next day, and plaintiff acted on that assurance, defendant was bound to furnish the cars at the specified time, and was answerable in damages for its failure to do so.

That defendant is bound by such contracts as are entered into in its name, by its agents within the actual or apparent scope of their authority, is, of course, conceded. It was held in Wood *v.* Chicago, M. & St. P. R. Co., 27 N. W. Rep. 473, that a station agent who was authorized to contract for the shipment of property from his station was presumed to be empowered to contract with reference to all the ordinary and necessary details of the business, and that when, from the nature of the property to be shipped or other circumstances, it was necessary or usual to arrange or contract for the shipment of the property in advance of its delivery, the company was bound by his contract to furnish the necessary cars at the specified time, whether he had any express power to make the contract or not. The ground of the holding is that, by placing him in charge of its business at that station, the company held him out as possessing authority to make the contract, and shippers were warranted in dealing with him on the assumption that he had full power in the premises. In the present case, however, the agent by whom it is alleged the contract was made, was not held out by defendant as possessing any power with reference to the subject of the contract. He was not in fact authorized to contract for the shipment of property from Olivet; nor was he held out as possessing such authority. His duties were limited to his own station, and there was nothing in the circumstances which warranted plaintiff in the assumption that he had authority to contract with reference to business at Olivet. The facts of the case do not, therefore, bring it within the principle announced in Wood *v.* Chicago, M. & St. P. R. Co., *supra*, and the doctrine of the instruction finds no support in that case.

The fact that the agent at Olivet requested plaintiff to go to Leighton, and procure the agent there to send the order for the cars, is not material; for his authority in the premises was neither actual nor apparently enlarged by that request. If the officer or agent to whom the order was transmitted had directed him to make the agreement for the furnishing of the cars on the next day, defendant would probably have been bound by it; but, under the instruction, plaintiff's right of recovery is not dependent on whether such direction was in fact given, but upon whether the agent represented that it had been given. The declaration of the agent at the time of the transaction is thus made proof of the extent of his powers. The instruction, we think, is clearly erroneous.

2. On the trial plaintiff was permitted, against defendant's objection, to testify to the statements of the broker who sold his hogs in Chicago as to the condition of the market on the

EVIDENCE.

nineteenth of October, and as to the price at which he would have been able to sell them if they had arrived in Chicago on that day. The evidence was mere hearsay, and should have been excluded.

3. It was within the discretion of the district court to permit plaintiff, on the first trial after the parties had rested, to introduce further testimony. Code, § 2799. It was also within the discretion of the court to grant a continuance of the cause if satisfied that substantial justice would thereby be more nearly obtained. Section 2749. The continuance was granted, for the reason that plaintiff had asked and obtained leave to introduce evidence material to the case after both parties had rested, and after defendant's witnesses had left the court. The costs of that trial were rendered useless by the continuance, and the continuance was rendered necessary by plaintiff's failure to introduce his evidence at the proper time. The costs were therefore properly taxed to him.

On plaintiff's appeal the judgment will be affirmed. On defendant's appeal it will be reversed.

Equipments—Not necessarily Duty of Company to Furnish Most Improved. —Where evidence showed that accident was occasioned by fracture of old form of brake, less effectual than newer form to stop train, *held*, that there was no evidence of negligence for the jury. Disher *v.* N. Y., etc., R. Co., 15 Am. & Eng. R. R. Cas. 283. See Lake Shore, etc., R. Co. *v.* McCormick, 5 Id. 474; Louisville & N. R. Co. *v.* Orr; Umback *v.* L. S. & M. S. R. Co., 8 Id. 98.

McCartney, Attorney-General, *et al.*,

v.

Chicago and Evanston R. Co. *et al.*

(112 *Illinois*, 611.)

An act of the Illinois legislature, in 1865, confirming an ordinance of the city of Chicago granting permission to a railway company, chartered by special act, to lay a track on and over certain streets from a certain point to the city limits, and authorizing the company to build a bridge over the Chicago river, the giving of which privileges had been accepted, is held to be a legislative recognition that the company then had a corporate existence, and had taken corporate action in the way of carrying out the purpose of its charter.

The persons named as corporators in a charter for a railway company, met within a few days after the passage of the charter, and by resolution adopted the same, and on the following day elected a president, vice-president, secretary and treasurer, and afterwards authorized the president to survey routes and locate the road, and to make contracts for the right of way and depot grounds, and books were opened for subscription to the capital stock, which

was all taken, and the company obtained permission of the commissioners of highways to locate and operate tracks along and across all roads and highways upon its route, and permission was obtained from the city of Chicago to locate and operate a track through a portion of the city and to build a bridge over the Chicago river, which grants were duly accepted, and the capital stock increased and subscribed for, though it did not appear that any of the subscriptions had been paid, and the company exercised other corporate acts. The charter under which these acts were performed, was granted, and the steps towards an organization were taken, prior to the adoption of the constitution of 1870. It was *held*, that the charter of the company was in operation at the time the constitution took effect, and was not abrogated by section 2 of article 11 of that instrument.

The words "to" and "from" a place or city, are construed to mean to or from a point within the place to or from which a corporation is authorized to construct a railroad. Authority to construct and operate a railroad from the city of Chicago to any point in the town of Evanston, is held to authorize the location and operation of the road from any point within the city of Chicago.

Where a railway company is authorized to build a railroad from a city to another place, the fact that it is also empowered to contract with a horse rail road company for the joint or separate operation of either or both companies' roads, as may be agreed on, will not operate as a limitation upon the railway company in respect to its entrance into the city.

But were it a matter of doubt whether a railway company may, under its charter, lay its track within the limits of a city, an act of the legislature confirming an ordinance of the city giving the company permission to lay its railway track in certain streets of the city, and declaring that the ordinance shall be held to confer on the company power and authority to construct and operate its road in the streets and over the bridge mentioned therein, until the same shall be altered, changed or amended by the common council, with the assent of the company, will remove the doubt and be regarded as a recognition of the right.

The passage of an ordinance by a city granting permission to a railway company to lay down tracks in certain streets, etc., which is accepted, with a resolution of such company that the proper construction of the ordinance is that the permission granted thereby was to operate in the city, cars with animal power only, and that the company should not connect with any other railroad on which other power is used, does not create a contract between the people represented by the city, and the railway company, to abandon for all time to come the use of steam within the city as a motive power; but such company may afterwards, on permission of the city, use steam to move its cars in the city. Such ordinance and its acceptance confer a limited right or privilege, but do not prohibit the acquisition of a more enlarged one in the future.

Authority in the charter of a railway company to build either a horse railroad or a steam railroad within a city, confers a continuing option to use either steam or animal power, or both, upon its road, or any part of it, which might be exercised from time to time. Under it the use of either motive power may be changed and the other substituted, as the company may see fit.

The charter of a railway company conferred the power of relocation, and an ordinance of a city was passed giving the company permission to construct and operate its road in and over certain streets of the city, and over a bridge to be built at a certain place, and such ordinance was confirmed by an act of the legislature, which conferred the same power as the ordinance, until the same might be altered, changed or amended by the city council, with the consent of the company, and gave such power to amend, alter or change the ordinance, with the company's consent. It was *held*, that such company, after having once located and built its road within the city, had still ample

legitimate authority, with the consent of the city, to relocate its track within the city, and take up its former track.

Where a railroad company lays its track in a street of a city, having the right to construct a track for passenger cars only, the city, under section 62, clause 90, of article 5 of the general law, has no power afterward to grant the use of the track for the operation of freight cars upon it, except upon a petition of property owners upon the street, as required in the statute, and a grant of the use of such track for freight purposes without the petition of property owners being void, such use is unlawful and a public nuisance, which the State may cause to be abated.

The owner of lots on each side of a navigable river, as the Chicago river, is also the owner of the underlying soil of the river, and may make any use of the river bed that suits his purpose, so that it does not materially or unlawfully interfere with the public easement to the use of the water in the stream.

Cities and villages incorporated under the general incorporation law are made the representatives of the State with respect to the control of streets and highways and bridges within their limits, and are invested with power to lay out, alter or vacate streets, regulate the use of the same, and to construct and keep in repair bridges, viaducts, etc., and regulate the use thereof.

A bridge built by a railway company over a navigable stream within the limits of a city, for the use of the railroad, under an ordinance of the city granting permission, and providing the manner in which it should be built, may be regarded as having been constructed by the city, and as falling fairly within the power given it to construct and repair bridges, and regulate the use thereof.

APPEAL from the superior court of Cook county; the Hon. HENRY M. SHEPHARD, Judge, presiding.

This was an information in chancery, filed by the attorney-general of the State of Illinois and the State's attorney of Cook county, in behalf of the people of the State, to enjoin the Chicago & Evanston R. Co. and the Chicago & Lake Superior R. Co. from building a railroad bridge over the north branch of the Chicago river, north of Kinzie street, and from constructing and operating certain railroad tracks, under an ordinance passed by the city council of Chicago, December 24, 1883.

The Chicago & Evanston R. Co. was incorporated by a special act of the General Assembly, February 16, 1861 (Private Laws 1861, p. 487). It was authorized to construct and operate a railroad, with horse-power or locomotive cars, "from the city of Chicago to any point in the town of Evanston," with authority to contract with the North Chicago Horse R. Co., or any other company or party, to operate their road, or the road of such other party. Section 2 of the charter contains this provision: "No authority is or shall be granted to said company, or to any other corporation or party, by the city of Chicago, to lay any railroad track in Wells, Dearborn, Wolcott, Cass, Rush, Pine, North or South Clark streets, or in Wabash or Michigan avenues, in the city of Chicago, but the laying of the same is hereby expressly prohibited."

August 17, 1864, the common council of the city of Chicago passed an ordinance giving permission to the Chicago & Evanston R. Co. to lay its track on certain streets therein named, commencing at the intersection of Madison and La Salle streets, in the South Division, running thence north on La Salle street to Erie, in the North Division, and thence, by certain streets designated, to the northern limits of the city; and to maintain and operate therein railway cars and carriages, in the manner and upon the conditions required by the various ordinances in relation to the Chicago City R. Co. and the Chicago West Division R. Co. These ordinances pertained wholly to the management and operation of street railways. Section 2 of the ordinance also required the cars and carriages used to be not inferior to the best street railway cars or carriages then in ordinary use in the city, and fixed the fares for any distance within the city at five cents, being the same charged by other street railway lines. Section 4 authorized the company to construct a bridge across the Chicago river at La Salle street, the city to pay one half the cost. The mayor entertaining doubts whether it sufficiently appeared, from the ordinance, that the company was limited strictly to the construction and operation of a street railway within the city, a certain preamble and resolutions were adopted by the Chicago & Evanston company, August 25, 1864, reciting the doubts of the mayor in the premises, and that for the purpose of removing such objections, and in consideration of his approval of the ordinance, it was resolved, among other things, as follows: "That it was the intention, and is the proper construction of said ordinance, that the Chicago & Evanston R. Co. should operate the cars and carriages used upon their railway tracks within the limits of the said city of Chicago, with animal power only, and that the said railway should not connect with any other railroad on which any other power is used." A certified copy of these resolutions was delivered by the company to the city.

February 6, 1865, the General Assembly passed what is popularly known as the "Ninety-nine Year Act" (Private Laws 1865, vol. 1, p. 597). The act is entitled "An act concerning horse railways in the city of Chicago." The first two sections extend the franchises of certain street railway companies, other than the Chicago & Evanston company, to ninety-nine years. The next is as follows:

"Sect. 3. An ordinance of the common council of the city of Chicago, entitled 'An ordinance concerning the maintenance and operation of the Chicago & Evanston Railroad in the limits of the city of Chicago,' as passed on the 17th day of August, A.D. 1864, is hereby confirmed, and shall be deemed and held to confer on the Chicago & Evanston R. Co. power and authority to construct and operate their road in the streets and over the bridge mentioned therein, until the same is altered, changed or amended by the com-

mon council, with the consent of said company; and such ordinance may, from time to time, be changed, altered or amended, and such other provisions be made, as to the common council may seem proper, and be agreed to by said company. The prohibition as to the use of certain streets, in the second section of the charter of the Chicago & Evanston R. Co., is hereby re-enacted, and shall remain in force until altered, released or amended by the common council of the city of Chicago and said company."

On June 12, 1872, an ordinance was passed by the common council of the city, authorizing the Chicago & Pacific R. Co. to construct and maintain a railroad, commencing at the western limits of the city, upon a route designated, to the north branch of the Chicago river; thence across the north branch to Jones avenue; thence on Jones avenue and Hawthorne avenue to Willow street, and upon certain other streets designated. The company was also empowered by the ordinance "to put down, construct and maintain, for passenger cars only, a single or double track, from the north side of Willow street, on Hawthorne avenue, to Larrabee street." Section 7 of the ordinance provided that the privileges granted to the Chicago & Pacific company were upon the express condition that it should permit the Chicago & Evanston company to use the tracks therein authorized to be laid upon the streets named, jointly with the Chicago & Pacific company, provided the ordinance should be null and void unless the tracks therein authorized were constructed within two years from its passage. By the same section the Chicago & Evanston company was authorized to connect with the tracks of the Chicago & Pacific company, on Jones avenue, and to construct and operate a single or double track from thence northwesterly, on Jones avenue, to Southport avenue, and thence north to the limits, upon the same conditions imposed by the ordinance upon the Chicago & Pacific company.

Early in June, 1874, the Chicago & Evanston company and the Chicago & Pacific company constructed a short piece of track on Hawthorne avenue, jointly, each company paying one half the cost, which track has ever since been kept in repair by the Chicago & Pacific company, and the separate track on Jones and Southport avenues to the city limits was constructed before June 12, 1872, the period of time required by the ordinance of 1872. The city of Chicago became incorporated in 1875, under the general act concerning cities and villages, approved April 10, 1872.

December 24, 1883, the city council passed an ordinance authorizing the Chicago & Evansville company to construct and operate a railroad, beginning at the northern boundary line of the city, near Herndon street, and thence southwardly, over certain property described, connecting with the present tracks of the Milwaukee & St. Paul R. Co., and of the Chicago & Evanston company, in Hawthorne avenue, near the centre line of Lewis street,

upon condition that the company, within ninety days, surrender all claims to the use of Southport avenue under any ordinances theretofore passed by the city, and remove its tracks therefrom. Section 2 of the ordinance authorizes the Chicago & Evanston company to construct and operate a railroad, commencing at the present terminus of its track near the junction of Larrabee street and Hawthorne avenue, thence southwardly, across certain described premises, and across block 9 of the assessor's division, south of Erie street and east of the Chicago river, to a point on the east bank of the river, in block 9, and thence across the river by means of a bridge, and across West Kinzie street, to a point of connection with the railroad tracks now laid in Canal street, or to and across such lands as the company may acquire in blocks 8 and 13 of the original town of Chicago,—such bridge to be constructed in such manner as not to unnecessarily obstruct navigation, and on a plan to be approved by the commissioner of public works. Section 4 of the ordinance authorizes the company to use and operate all railroad tracks by the ordinance authorized to be laid, and theretofore authorized to be laid, in Hawthorne avenue, for all general business incident to railroads, by freight, passenger, and other cars, or by steam or other power. Section 12 provides that all the rights and privileges granted to the Chicago & Evanson company are, in like manner and subject to the same conditions, granted to the Chicago & Lake Superior company, and the two companies may jointly or severally construct and operate the railroad authorized by the ordinance, in such manner and upon such terms as may be mutually agreed upon between them. The Chicago & Lake Superior R. Co. was incorporated under the general railroad act of Illinois, October 6, 1883. No petition of the property owners representing more than one-half of the frontage upon so much of Hawthorne avenue or of Canal street as is sought to be used for railroad purposes under this ordinance, was ever had, but the Chicago & Evanston company disclaims any right or intention of using Canal street lengthwise. The ordinance was immediately accepted, by formal vote of both companies, and was about to be put in force, and its grants acted upon by the two companies, when the information was filed.

The Chicago river is a part of the navigable waters of the United States flowing into the St. Lawrence, which were declared by the ordinance of 1787, for the government of the Northwest Territory, to be "common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States." The river is navigated by vessels which sail upon the great lakes. About three quarters of a mile from its mouth it divides into what are known as the north and south branches, which diverge almost at right angles with the main stream, both branches being navigable. Upon the north branch, and adjacent to the point at which

the defendant companies propose to erect the bridge authorized by the ordinance of December 24, 1883, there are extensive wharves, warehouses and coal depots, used in connection with the business of navigation, for receiving and delivering freight to and from various ports on the great lakes. There are already two bridges across the north branch in that immediate vicinity,—one being a bridge erected by the city, and known as Kinzie street bridge, the other being the railroad bridge of the Chicago & Northwestern R. Co, immediately below the former. The information prayed that the defendants might be enjoined from constructing any railroad track not already built, in any of the streets of the city, and from constructing any bridge over or across the north branch of the Chicago river, and from operating, by steam or other power, any cars o rtrains of any kind over any tracks or bridge whose construction was attempted to be authorized by the ordinance of December, 1883, and from operating, by steam or other power, any railroad cars or trains upon any tracks which had been authorized to be laid on Hawthorne avenue before the passage of the ordinance of December, 1883. The Chicago & Evanston company answered the information, and the Chicago and Lake Superior company filed a general demurrer. The court overruled an interlocutory motion for a preliminary injunction, and upon the final hearing, upon the pleadings and proofs, and upon the demurrer of the Chicago & Lake Superior company, the information was dismissed for want of equity, to reverse which decree the complainants have taken this appeal.

Melville W. Fuller and *J. L. High* for appellants.

E. Walker and *W. C. Goudy* for appellees.

SHELDON, J.—It is contended by appellants that the Chicago & Evanston R. Co. ceased to have corporate existence on the 8th day of August, 1870 (the day the constitution of 1870 went in force), by virtue of section 2 of article 11 of that constitution which reads "All existing charters or grants of special or exclusive privileges, under which organization shall not have taken place, or which shall not not have been in operation within ten days from the time this constitution takes effect, shall thereafter have no validity or effect whatever." It is denied that the charter of the company was in operation within the time fixed by the constitution.

CHARTER—FORFEITURE FOR NON-ACTION—WHAT ACTS SUFFICIENT TO PRESERVE.

The facts appearing are, that the company was incorporated February 16, 1861. The persons named as incorporators in the charter constituted the first board of directors. The capital stock was fixed at $100,000, with power to increase it to $300,000. The incorporators named in the charter met February 19, 1861, and, by resolution, accepted the charter, and the following day elected a president, vice-president, secretary and treasurer. April

16, 1861, at a meeting of the directors, it was resolved that the president be authorized to survey routes and locate the road, and to make contracts for right of way and depot grounds. Resolutions were also passed authorizing the opening of books for the subscriptions to capital stock, and regulating the same. The stock was subscribed, but it does not appear that any payments were made on any of the subscriptions. February 21, 1861, the commissioners of highways of the towns of Lake View and Evanston granted permission to the company to lay down and operate their railroad along and across all roads and highways along and upon which the route of their road might be located, and March 10,1862, at a meeting of the board of directors, such grants of rights of way were accepted, by resolution. At the same meeting the president reported that he had purchased depot grounds in Evanston, and had contracted to give one share of stock therefor, and it was voted that the purchase be approved. At a meeting of the stockholders, June 10, 1864, the capital stock was increased to $300,000, which was subscribed the same month, but it does not appear that any payments were made on any of the subscriptions. August 17, 1864, the common council of Chicago passed an ordinance giving permission to the company to lay a track, commencing in the city of Chicago, at the corner of Madison and La Salle streets, and running thence north, on designated streets, to the northern limits of the city, and authorizing the company to construct a bridge over the Chicago river. The company, on the 25th of August, 1864, passed certain resolutions, declaring as to what was the proper construction of the ordinance, and, with such construction, the ordinance was accepted. February 6, 1865, the General Assembly passed an act confirming the above ordinance. This was a legislative recognition that the company had then a corporate existence, and that it had taken corporate action, in the way of carrying out the purpose of its charter, to the extent of having secured from the city of Chicago permission to lay its track in the streets of the city, and to bridge the Chicago river. January 9, 1865, the annual election of the corporation was held, and certain persons were elected directors. In the summer of 1865, John Evans, a subscriber of stock, filed a bill in the superior court of Cook county, against the Chicago & Evanston R. Co. and others, on which a writ of injunction was allowed, by which all of the persons who were then acting as directors, or claiming to be such, were enjoined from assuming to act as directors of the company by virtue of the election held January 9, 1865. The injunction remained in force until 1872, when it was dissolved. The existence of this injunction may afford somewhat of explanation for the intermission of any further corporate action during the pendency of the injunction.

LEGISLATIVE RECOGNITION.

These enumerated acts show that in addition to organization,

there was considerable of corporate action in effectuation of the object of the charter. It is said that because it does not appear that any money had been received or expended, or any work done in the actual construction of the road previous to the time fixed by the constitution, the charter was not at that time in operation. The constitution is silent as to what extent the charter should have been in operation, requiring, merely, its being in operation. This was not the case of a dormant charter or of but a mere paper organization, as is claimed, and in view of all the corporate action which in this case had been had toward carrying out the purpose of the incorporation, we cannot say that the charter of this company was not in operation at the time of the adoption of the constitution of 1870.

It is denied that the Chicago & Evanston R. Co. has authority to construct and operate a railroad within the city of Chicago.

TERMINAL POINTS—"FROM" CITY "TO" CITY PERMITS ENTRANCE INTO CITY.

Stress is laid upon the peculiar language of the charter in giving power to construct and operate a railroad "*from* the city of Chicago to any point *in* the town of Evanston," as indicating the intention to make the southern terminus of the road the northern boundary of the city of Chicago. The case of Northeastern R. Co. *v.* Payne, 8 Rich. (S. C.) 177,—the only one cited by appellant's counsel in support of this position,—is in point, as sustaining it. We are aware of no other like authority. The words *from* and *to* a place have frequently, in the charter of a company, been construed to mean from and to a point within the place from and to which the corporation was authorized to construct its road, and especially where there is found in the body of the act anything indicating that intention. Moses *v.* Railroad Co. 21 Ill. 516; Farmers' Turnpike Co. *v.* Coventry, 10 J. R. 389; Mohawk Bridge Co. *v.* Railroad Co., 6 Paige, 554; Mason *v.* Railroad Co., 35 Barb. 373; Western Pennsylvania R. Co.'s Appeal, 99 Pa. St. 155. This is the reasonable interpretation which, we think, should be adopted in this case, as required by the public object of the grant, in the accommodation of the public with railroad facilities.

The difference of language employed with respect to the two places of Chicago and Evanston,—the language being, "from the city of Chicago to any point in the town of Evanston,"—is remarked upon as showing that the road was to commence to run from the northern boundary of the city of Chicago; that if the intention had been to run from any point in the city of Chicago, it would have been so expressed, as it was in regard to Evanston. We do not attach any special importance to this difference of phraseology. The concluding sentence of section 2 of the charter, that "no authority is or shall be granted to said company, or to any other corporation or party, by the city of Chicago, to lay any railroad track in Wells, Dearborn," and certain other streets named, in the city of Chicago,

"but the laying of the same is hereby expressly prohibited," seems to indicate that the legislature intended to give power to enter the city and run to a point within it,—else why prohibit the use of certain streets within the city? Appellant's counsel would refer this prohibition to the "North Chicago Horse R. Co., or any other company or party" with whom the second section of the charter provides that the Chicago & Evanston R. Co. "may contract to operate their road, or the road of such other party, either separately or jointly, as may be agreed upon," and their construction being that these words last quoted were a restriction on the rigtht to enter the city, and showed the purpose was to allow the company to build its road from a point in the town of Evanston to the northern limits of the city, and then, by contract with the North Chicago City R. Co., or some other company, to enter the city. We do not agree with this view. We consider that the charter gave to the Chicago & Evanston company the power to construct their road to a point within the city, and also gave to them the further power to contract with the North Chicago Horse R. Co., or any other company, for the reciprocal operation of each other's road, either separately or jointly, as might be agreed upon, and that this power given to so contract with the North Chicago Horse R. Co., or any other company, was not a limitation on the Chicago & Evanston company as to entrance in the city. But were there doubt on this point, it would seem to be removed by the act of the General Assembly of February 6, 1865, which confirmed the ordinance of August 17, 1864, giving permission to the company to lay its railway tracks in certain streets of the city, and declared that the ordinance should be held to confer on the company power and authority to construct and operate their road in the streets and over the bridge mentioned therein, until the same should be altered, changed or amended by the common council, with the consent of the company.

It is strenuously insisted that the Chicago & Evanston R. Co., if it has a corporate existence, and authority to construct its road to a point within the city of Chicago, is, within the limits of Chicago, only a street railway. The proposition is, that since the acceptance by the Chicago & Evanston R. Co. of the ordinance of August 17, 1864, it was and is, and for the remaining period of its corporate existence must continue to be, a street railway company within the limits of the city of Chicago, and has forever abandoned and surrendered the right to the use of steam as a motive power within the city; that upon the signing of the ordinance by the mayor, accompanied, as the ordinance was, with the company's resolution in regard to it, there became a complete contract between the company and the people, represented by the city authorities, which contract, in brief, was, that in consideration of the grant by the city of the valuable

ANIMAL OR STEAM POWER—OPTION IN ORDINANCE.

rights embraced in the ordinance of August 17, 1864, the company renounced and abandoned, for all time to come, the use of steam as a motive power within the limits of the city, from which contract the company has never been released; that there being thus an absolute incapacity on the part of the company to operate any tracks by any other than animal power within the limits of Chicago, resulting from the voluntary contract of the company thus entered into, upon full consideration, the city was powerless to grant or the company to receive the right to operate by steam within the city limits, as attempted by the ordinance of December 24, 1883. There is, throughout the ordinance of August 17, 1864, and the company's resolution in regard to it, not a word expressive of the idea of anything perpetual, or of future limitation or restriction, in relation to the subject matter. Under and by the terms of the ordinance, the company acquires something from the city, but it does not abandon or surrender anything. The ordinance gives permission to the company to lay a railway track on certain streets in Chicago. The resolution of the company in regard to it is, that the intention and proper construction of the ordinance is, that the company shall operate its cars within the limits of Chicago with animal power only. It merely declares what the ordinance means, —defines the extent of the permission granted by it,—so that by the ordinance, with the company's resolution, there was given permission to use animal power only. And that was the sum of it. Under the permission given by that ordinance, there could clearly be used animal power only. There was power in the city to give permission to use both animal power and steam power, or either, within the city. It saw fit, by that ordinance, to only give permission to use animal power. But there is no language in the ordinance indicative that the city might not, by some future ordinance, permit the use, within the city, of steam as a motive power, or suggestive of the idea that the city was tied up from giving, and the company from receiving, ever afterward, permission to so use steam power within the city. All of anything savoring of perpetual, or of restriction in the future, which we discover in the ordinance, is in respect of the power of the city to recall what it granted by the ordinance. It may be that the city could not, without the consent of the company, withdraw the permission which was granted by the ordinance.

The only possible foundation which we are able to see for this claim made by appellants, is, that the charter authority is but to build either a horse railroad or a steam railroad,—that there was an option with the company to build either kind of road, but that it was an option which could only be once exercised, and that therefore, when the company accepted the ordinance permitting the use of animal power, only, within the city, that was an exercise of its option to construct within the city a horse railroad; that there re-

mained no further option on the subject, and that, under the charter, the road within the city must ever afterward remain a horse railroad. We cannot adopt this construction of the charter. The power given by the charter was to operate the road to be constructed, with "horse-power or locomotive cars." We read this as giving an option to the company to use either animal power or steam power, or both, upon their road, or any part of it; that this was a continuing option, which might be exercised from time to time; that after the use, for a time, of either kind of power, the other kind might be substituted, as the company saw fit; so that when the common council gave to the company permission to use, within the city, only animal power, there could be, under that permission, only the authority to use that kind of power within the city; but still the right remained, under the charter, to use steam power within the city whenever the city authorities should give permission to do so. The act of February, 1865, confirms the ordinance of August 17, 1864, and provides expressly that the ordinance may, from time to time, be changed, altered or amended, and such other provisions be made as to the common council may seem proper, and be agreed to by said company.

Appellee's counsel place reliance upon this act as giving full legislative authority to the city council to pass the ordinances of June 12, 1872, and December 24, 1883, granting to the Chicago & Evanston company permission to operate their road, within the city of Chicago, by steam power. If we could agree with appellant's counsel that there was, by the acceptance of the ordinance of August 17, 1864, a loss to the company of all right under their charter, at any time afterward, to operate their road within the limits of Chicago by steam power, even by permission of the city, then we should have difficulty in finding in this act alone a source of legislative authority to use steam power within the city. The title of that act is, "An act concerning horse railways in the city of Chicago." The constitution of 1848, in force at the time of the passage of the act, has the provision: "And no private or local law which may be passed by the General Assembly shall embrace more than one subject, and that shall be expressed in the title." If this road within the city of Chicago was, at the time of the passage of this act, in all respects but a mere horse railway in the city, it might well be doubted whether the converting of it into a steam railroad, or the giving to the city authority to make such conversion, would be a subject expressed in the title of the act. But we do not feel the necessity of recourse to this act as giving the legislative authority. We look to the charter of the company as giving to it the right to operate its road within the city of Chicago with steam power, regarding, as already said, the right as never having been lost to the

SUBJECT AND TITLE OF ACT.

company, but as ever having remained, with authority to so exercise it whenever permission to do so should be given by the city.

It is contended that the Chicago & Evanston company has no authority to change its tracks in the city of Chicago, as provided may be done by the ordinance of December 24, 1883. The charter of the company confers upon the corporation no power of relocation, and it is insisted that there is conferred but one power of location, and that the power of location having once been exercised is exhausted, and that no new location of its line can be made, and hence that the power of location was exhausted by the ordinance of August 17, 1864, and that there can be no new location of its line, as contemplated by the ordinance of December, 1883. We shall not meddle with the question of the general power of a railroad company to change the location of its line of road once made, in the absence of any power of relocation given by its charter. There may not be entire agreement of the authorities upon that question. We shall confine ourselves to the power in this regard which exists with respect to this particular railroad within the city of Chicago.

CHANGE OF LINE—IS SPECIAL POWER TO RELOCATE NECESSARY?

The city of Chicago has been incorporated, under the general law of 1872 in relation to cities and villages, since May, 1875. By clause 25, section 1, article 5, of that act, the city council has power "to provide for and change the location, grade and crossings of any railroad." By clause 9, to regulate the use of streets. The ordinance of August 17, 1864, located the road on certain streets in the city, in accordance with the desire of the company, and fixed the place for bridging the river. The act of February, 1865, confirmed that ordinance, and declared that the ordinance should be held to confer on the Chicago & Evanston R. Co. power and authority to construct and operate their road in the streets and over the bridge mentioned therein, until the same was altered, changed or amended by the common council, with the consent of said company, and that such ordinance might, from time to time, be changed, altered or amended, and such other provisions be made as to the common council might seem proper, and be agreed to by the company. It appears to us that there was here full legislative warrant for the change of location that was made. We deem it immaterial that there is no provision on the subject in the charter of the company. The ordinance of June 12, 1872, changed the route of the railroad from that mentioned in the ordinance of 1864, and required the surrender of a certain street mentioned in the former ordinance. The changes authorized by the ordinance of 1883 are: To remove the tracks of the company from the northwestern end of Hawthorne (formerly Jones) avenue, and from Southport avenue, and relay them on a line nearly two blocks east of Southport avenue, across a tier of lots which have

been purchased or acquired by condemnation by the company; to extend the tracks from the southern end, as laid at the junction of Larabee street and Hawthorne avenue, southeasterly, across land purchased, or acquired by condemnation, to the east bank of the north branch of the Chicago river, on block 9, a short distance north of the Kinzie street bridge; to construct a bridge across the river at that point, and extend the tracks thereon; to extend the tracks from the west bank of the river to a point of connection with the tracks laid on Canal street, which tracks lead into the union depot on the west side of the river, between Madison and Adams streets. This is an alteration and change of the location of the tracks of the railroad, and of the place of bridging the river, as they were fixed by the ordinance of 1864. It is in these respects an alteration and change of that ordinance, although the ordinance of 1883 does not so purport on its face, and we think that such change of location comes clearly within the express power given by the act of 1865, to alter, change and amend the ordinance of 1864, and make other provisions upon the subject, as well as within the power given to the city by the general law, to provide for and change the location, grade and crossings of any railroad within its limits.

It is denied that these railroad companies have authority to bridge the north branch of the Chicago river. As is alleged, the information is filed in a dual right or capacity of the State,—being, first, the proprietary right of the State to the soil underlying its navigable waters; and second, its representative capacity to protect the interests of navigation in behalf of its citizens concerned therein.

It appears that at the time of the hearing of the case in the court below, the Chicago & Evanston company was the owner of the lots and docks on the east side of the river at the point where the bridge is proposed to be built, and had commenced proceedings to acquire title to the private property on the west side, under the law of eminent domain, since when, as alleged, it has acquired such title under such proceedings. It follows, then, that the company, as owner of the property on each side of the river, is also owner of the fee in the underlying soil of the river there, and may make any use of such river bed as suits its purpose, so that it does not materially or unlawfully interfere with the public easement to the use of the water in the stream. This is abundantly settled by the decisions in this State: Middleton *v.* Pritchard, 3 Scam. 520; Canal Trustees *v.* Havens, 11 Ill. 557; City of Chicago *v.* Laflin, 49 Id. 172: Braxon *v.* Bressler, 64 Id. 488; Railroad Co. *v.* Stein, 75 Id. 41. There is, then, in this case no question of purpresture,—here is no intrusion upon the property of the State, and no public nuisance resulting from an invasion of the property rights of

NAVIGABLE STREAM—UNDERLYING SOIL—TITLE IN ADJACENT OWNERS.

the people, and the information manifestly fails upon the first ground of the proprietary right of the State to the soil underlying its navigable waters.

In the recent decision of the Supreme Court of the United States, in the case of Escanaba Co. *v.* Chicago, 107 U. S. 678, sustaining an ordinance of the city of Chicago requiring all bridges across the Chicago river to be closed within certain hours, the doctrine is laid down, that until Congress acts upon the subject, the power of the State over bridges across its navigable waters is plenary. And it is there said: "And nowhere could the power to control the bridges in that city (Chicago), their construction, form and strength, and the size of their draws, and the manner and time of using them, be better vested than with the State, or the authorities of the city upon whom it has devolved that duty." The city we look upon as the representative of the State, with respect to the control of streets and highways and bridges within the city limits. The general act for the incorporation of cities and villages, adopted by the city of Chicago, contains the following provisions: Article 5, section 1, clause 7, gives the city council power to lay out, establish and alter streets, etc., and vacate the same. Clause 9, "to regulate the use of the same." Clause 25, "to provide for and change the location, grade and crossings of any railroad." Clause 28, "to construct and keep in repair bridges, viaducts and tunnels, and to regulate the use thereof." Article 5, section 10: "The city or village government shall have jurisdiction upon all waters within or bordering on the same, to the extent of three miles beyond the limits of the city or village, but not to exceed the limits of the State." The ordinance of December, 1883, provides as to the construction of the bridge, that "said bridge shall be constructed in such a manner as not to unnecessarily obstruct navigation, and on a plan to be approved by the commissioner of public works of the city of Chicago."

The State itself, no doubt, might construct the bridge. It might, as the legislature has here done, vest the local government of the city with authority to build the bridge. But it is claimed that the authority is reposed only in the city itself to build bridges, and is a power which is incapable of being delegated by the city to another. We do not consider that there is any delegation of the power in the case. The city through the corporation does build the bridge. It matters little by what hands the bridge is built, or who lets the contract for the construction. The essential thing is determining whether the public interest calls for a bridge, and where and in what manner it shall be built,—and this is done by the city authorities. We think the authorization by the city, as in this case, of the building of the bridge by a corporation, comes fairly within the power given to the city to construct and keep in repair bridges, and to regulate

BRIDGES—POWER OF CITY EXERCISED BY CORPORATION.

the use thereof. But further, the same may be remarked of the act of 1865, as expressly authorizing the building of the bridge, as was said of the act in reference to the change of location of the road. The ordinance of August 17, 1864, authorized the Chicago & Evanston company to construct a bridge to cross the Chicago river at La Salle street. The act of 1865, in confirming that ordinance, certainly gave the legislative sanction to the building by the company of a bridge at La Salle street, and the provision of the act, that the ordinance might, from time to time, be changed, altered or amended, gave the power, we think, to change the place of the building of the bridge from La Salle street to the place designated in the ordinance of December, 1883.

It is insisted that these defendant railroad companies have no right to use Hawthorne avenue and Canal street longitudinally, as there has not been the consent thereto of a majority of the property owners upon such streets. The provision of the statute upon the subject is as follows: "The city council or board of trustees shall have no power to grant the use of, or the right to lay down, any railroad tracks in any street of the city, to any steam or horse railroad company, except upon a petition of the owners of the land representing more than one half of the frontage of the street, or so much thereof as is sought to be used for railroad purposes." Section 62, clause 90, of article 5, of the general city and village incorporation law, before cited. The Chicago & Evanston company disclaims any intention to run longitudinally through any portion of Canal street, and the ordinance does not seem to give the permission to do so, the language, in this respect, being, "thence across the Chicago river by means of a bridge, and across West Kinzie street, to a point of connection with the railroad tracks now laid on Canal street." As respects Hawthorne avenue, the fourth section of the ordinance of December, 1883, provides that the Chicago & Evanston R. Co. "may use and operate all railroad tracks hereby authorized to be laid, and heretofore authorized to be laid, in Hawthorne avenue, for all general business incident to railroads, by freight, passenger and other cars, and by steam or other power." The tracks theretofore authorized to be laid in Hawthorne avenue were under and by virtue of the ordinance of June 12, 1872. Section 1 of that ordinance, after naming a certain route, provides, "and also to put down and construct and maintain, for passenger cars only, a single or double track, from the north side of Willow street, in Hawthorne avenue, to Larrabee street." It is by virtue of this ordinance, alone, that any authority had been given to lay tracks in Hawthorne avenue, and reference is made to this provision in the fourth section of the ordinance of December, 1883. This ordinance, in 1872, was passed when the city of Chicago was acting under its former special charter, and before the time of its becoming

RAILWAYS IN STREETS—CONSENT OF PROPERTY OWNERS.

incorporated, in 1875, under the general act for the incorporation of cities and villages, under which it has ever since been acting. The former special charter, in 1872, did not require the consent of the majority of the property owners fronting upon a street, in order to the laying down in it of a railroad track. Such requirement is only by the general act. It is under and by virtue of the ordinance of June 12, 1872, that the Chicago & Evanston company claims justification of the authority given by the ordinance of 1883 to use the tracks in Hawthorne avenue "for all general business incident to railroads, by freight, passenger or other cars," without having obtained the consent of a majority of the property owners fronting upon the street. But the permission and authority which were granted by the ordinance of 1872, to lay tracks in Hawthorne avenue, was to "put down, construct and maintain, for passenger cars only, a single or double track." Here is a careful restriction to passenger cars only. Permission to lay down a track for passenger cars only, is something quite different from a permission to lay a track for freight cars. There is a substantial and most material distinction as respects the two classes of cars, the hurtful effects from the operation of freight cars in the streets of a city being very much greater than in that of passenger cars.

It is said that the consent required is only as to the laying down of tracks, and not as to the use of tracks which have been constructed; that the laying of the tracks was under authority of the ordinance of 1872; that the ordinance of 1883 but permitted an enlarged use of tracks already laid,—a use for freight cars; that in case of a railroad track, once rightfully laid, there is no restriction upon the city as to granting any use of it. This we regard a too strict interpretation of the provision in question. Where a railroad company lays its track in a street, having but the right to construct and maintain a track for passenger cars only, we think that under this provision of the statute the city has not power afterwards to grant the use of the track for the operation of freight cars upon it, except upon a petition of property owners upon the street, as named in the statute. The granting of the use of freight cars upon a track which was one for passenger cars only, would, we consider, within the intendment of this statute provision, be tantamount to granting the right to lay down a track for freight cars, and so come within the provision. But if the grant of this use for freight cars be unauthorized, it is objected that the complainants in this case have no right to any relief as to the use of freight cars in Hawthorne avenue; that the city has the exclusive control of the streets, and represents the public in all matters concerning them, and that no complaint can be made other than by the city, or by the abutting property owners, whose consent should have been obtained. Where this required consent has not been obtained, the city is absolutely without power to grant the license, and the

exercise of it would be wholly without warrant, and unlawful. It is not the city alone, or abutting property owners, that are concerned about the unlawful obstruction of a street of a city. All the people of the State are entitled to the use of such street as being a public highway, and are interested to have it maintained free from unlawful obstruction, and we are of opinion that the complainants in this case are entitled to the relief they ask as to the use of freight cars in Hawthorne avenue, to prevent a public nuisance.

Much of what has been said with respect to the Chicago & Evanston R. Co. applies, of course, to the Chicago & Lake Superior R. Co. The latter company stands in a different position from the former, in its having filed a demurrer, and thereby admitted the allegations of the information. But as we do not see that the ordinance of December, 1883, does authorize the use of Canal street lengthwise, we think the decree of dismissal of the information may stand against both companies alike, although the Chicago & Lake Superior company has not, like the other company, disclaimed any right or intention of using Canal street lengthwise, under the ordinance of December 24, 1883.

The decree dismissing the information will be affirmed in all things except in the respect of the use of freight cars in Hawthorne evenue. In that respect the decree is reversed, and the cause remanded for further proceedings conformable to this opinion.

Decree reversed in part and in part affirmed.

Scott, J. (dissenting).—The case being considered is of such importance, that in dissenting from the judgment to be rendered it seems proper that I should state my reasons, in part at least, for so doing. As respects some of the questions involved, I concur with the majority of the court, but perhaps for reasons other than those assigned in the principal opinion. I shall only remark upon what I regard as the controlling questions in the case. That my views may be better understood, I wish first to make a statement of the matters at issue, as they appear to me from the pleadings and the evidence.

The bill is an information in chancery, brought by the attorney general of the State for and in the name and behalf of the people, by the authority of the people of the State, and also in their proprietary right as owners of the soil of the Chicago river, against the Chicago & Evanston R. Co. and the Chicago & Lake Superior R. Co., and was to enjoin and restrain such corporations, or either of them, from in any manner building, erecting, constructing or working upon any railroad track, embankment, superstructure or railroad not already built in any of the streets of the city of Chicago, and from building, erecting or con-

Statement of case.

structing any bridge over or across the north branch of the Chicago river. It is alleged the Chicago & Evanston R. Co. was incorporated under a special act of the legislature, passed in 1861, and the charter is set out at length, so that it fully appears what power the corporation could properly exercise, if it is still an existing corporation, under that act and the amendatory act of 1865. It is also alleged the Chicago & Lake Superior R. Co. was incorporated October 6, 1883, under the general laws of the State, and its powers as a corporation are, of course, derived from the general law in relation to the incorporation of railroad companies.

Among the grounds upon which relief is demanded are, first, that the charter of the Chicago & Evanston R. Co. of 1861, as amended by the act of 1865, was repealed or annulled by section 2, article 2, of the constitution of 1870, for the reason, it is alleged, such corporation was not, previous to the adoption of the constitution, organized, nor was it in operation within ten days after it went into force, on the 8th day of August, 1870; second, that the Chicago river is a navigable river, and that the title to the soil and bed of the river is in the people of the State of Illinois, and that the corporations named as defendants purpose, under powers claimed to be derived from their charter, and the general incorporation law, and certain ordinances of the city of Chicago, to construct a bridge over the north branch of the Chicago river near Kinzie street, and that it is unlawful for such corporations, or either of them, to construct such bridge without first having obtained authority so to do from Congress, or from the legislature of the State of Illinois; and third, that the Chicago & Evanston R. Co. has no authority of law to construct any railroad for general business within the limits of the city of Chicago, and to operate the same with steam power. All other allegations are in support of these general propositions. So far as other matters contained in the bill may be deemed important to an understanding of my views, they will be stated.

It is not claimed the Chicago & Evanston R. Co. has any authority from the State to construct and operate its railroad within the limits of the city, or to construct a bridge across the Chicago river, other than that which is contained in its original charter of 1861, and the amendatory act of 1865. If it has any other authority, it is derived solely from city ordinances the validity of which is challenged by appropriate allegations contained in the bill. As has been seen, the Chicago & Lake Superior R. Co. was organized under the general law in relation to incorporating railroad companies. Railroad companies organized under that law have express authority to bridge all streams it may be necessary to cross in constructing their respective roads, whether navigable or not. No railroad company, however, can construct its line of road along or across any street within the limits of an incorporated city or

village without first having obtained the consent of the municipal authorities of such city or village. The only authority it is insisted the Chicago & Lake Superior R. Co. has now or ever had for entering and operating its line of road within the limits of the city, is contained in the ordinance of December 24, 1883. So, too, the authority of the Chicago & Evanston road to construct and operate its road within the limits of the city on the route now proposed, if any exists, is contained in the same ordinance. The only license from the city to either corporation to construct a bridge over the Chicago river at the point indicated is given by the same ordinance of 1883. The authority or validity of that ordinance is challenged by the bill for two reasons: first, the city has no authority to authorize either corporation to construct a bridge over the Chicago river—such authority, it is said, could only come from Congress or the State; and second, the municipality of Chicago has no power, under its charter, to permit either corporation to construct or operate any line of railroad on Canal street or Hawthorne avenue, except upon the petition of a majority of the owners of land abutting on such streets. No consent was ever given by the property owners on such streets, to either corporation, to construct its road on either street, and it is alleged the ordinance in that respect is null and void. The admission in the record in regard to this allegation of the bill is, "that no petition of the property owners of lands representing more than one half of the frontage of Hawthorne avenue or of Canal street, or of so much thereof as is sought to be used for railroad purposes, under and by virtue of said ordinance of December 24, 1883, was ever had or procured, but defendants disclaim any right or intention of using Canal street lengthwise, under said ordinance of December 24, 1883." No permission had previously been given, by any ordinance of the city, to any company, to construct any railroad for general business, and operate the same either in Hawthorne avenue or in Canal street. It seems some track had previously been laid in Hawthorne avenue, either by the Chicago & Pacific R. Co. or the Chicago & Evanston R. Co., or by both, and which the Chicago & Lake Superior and the Evanston companies were authorized to use by the ordinance of 1883. That track in Hawthorne avenue seems to have been laid under an ordinance passed in 1872. Steam was authorized by that ordinance as a motive power in propelling cars, but both companies that had the right to use such track in Hawthorne avenue were restricted to moving only passenger cars over it. The ordinance of 1872 was afterwards repealed by the city council, in 1876. It is said by the defence that repealing ordinance was declared by the United States circuit or district court to be invalid or void, and for that reason it should not now be regarded as ever having had any force. It matters little whether it was or not. The Chicago & Evanston

R. Co., only, answered the bill. It denied all the charges of want of authority to construct and operate its road within the limits of the city, or to construct a bridge over the Chicago river in connection with its road, and asserted its right and power to construct and operate its railroad under its original and amended charters, and under the ordinances of 1872 and 1883. Its answer was not under oath, that having been waived, and to which a replication was filed. The Chicago & Lake Superior company made no answer to the bill, but filed a demurrer thereto, which was sustained. Upon the final hearing, upon bill, answer and proof, the court dismissed the bill.

The charters of the defendant corporations, and the franchises they may therefore exercise, are so different, it will be most convenient for me to consider them separately, in some respects. It is seen that by section 12 of the ordinance of December 24, 1883, all the rights, privileges and powers by that ordinance granted to the Chicago & Evanston R. Co. were in like manner, and subject to the same restrictions, granted to the Chicago & Lake Superior R. Co. A new ordinance containing the same identical provisions, applicable to the latter company alone, would have had no greater force. Every license or privilege granted to the Evanston company is available for the benefit of the Chicago & Lake Superior R. Co., in as full a measure as if the former company never had any existence; and if it should be found to have no right to exercise the privileges conferred by the ordinance, that fact would not militate against the right to exercise the privileges conferred on the Lake Superior company by the ordinance. Regarding every section of the ordinance as specifically applicable to the Lake Superior company, as may be done, what privileges may it exercise? It is granted a license or privilege to construct, maintain and operate, with steam power, a railroad, with one or more tracks, and such switches, sidings and turn-outs as the company may deem necessary, along and upon a route definitely described. By the first section, permission was given to connect with tracks then in Hawthorne avenue. That, of course, would be equivalent to giving that company the right to acquire the use of such track, and the privilege to construct for its own use such other tracks, switches, sidings and turn-outs as it might deem necessary. By the second section permission was given, in the construction of another part of its road, after crossing the Chicago river and West Kinzie street, to connect with "tracks now laid in Canal street." By the fourth section this company was authorized to use and operate all railroad tracks by the ordinance authorized to be laid or before that time authorized to be laid, in Hawthorne avenue, for all general business incident to railroads, by freight, passenger, and other cars, by steam or other power. It was, however, provided the company should not run over such tracks trains of more than thirty cars, and that all regular trains

should be run at least ten minutes apart, and not oftener. What is all this but a license to a railroad company recently organized under the general law, with a franchise to construct a railroad from Chicago to Lake Superior, for the transaction of a general freight and passenger business, in cars to be propelled by steam or other power, within the limits of the city, and along and in certain streets? Plainly, that is what this ordinance means, and no reasoning can justify any other construction. So far as this municipal government by this ordinance attempted to grant to this company the privilege to construct and operate its road lengthwise in any street in the city except upon a petition of the owners of the land representing more than one half the frontage of such streets, it is void. Rev. Stat. 1874, chap. 24, art. 5, sect. 1, div. 19; Railroad Co. *v.* Dunbar, 100 Ill. 110. The ordinance in that respect is void for want of power in the common council to enact it. A fair construction of the ordinance is, this company may, in the construction of its road, occupy lengthwise a portion of Hawthorne avenue and Canal street. It is averred in the bill it is the intention of the company to do so, and the demurrer admits the allegation of the bill, so far as it appears. That being so, I am of opinion it was clearly error in the court to sustain the demurrer to the bill, and the decree as to the Chicago & Lake Superior R. Co. ought for that reason be reversed.

RAILROADS IN STREETS—CONSENT OF ADJACENT OWNERS.

Passing now to consider matters that alone affect the Chicago & Evanston R. Co., the first question that presents itself is, whether its charter of 1861, as amended by the act of 1865, since the adoption of the constitution of 1870 has any validity or effect. Section 2, article 11, of that instrument declares: "All existing charters or grants of special or exclusive privileges under which organization shall not have taken place, or which shall not have been in operation within ten days from the time this constitution takes effect, shall thereafter have no validity or effect whatever." It appears the company was in fact organized soon after the passage of its original charter, in 1861, and an organization has been maintained ever since, by the election of the usual officers for such corporations. It seems no work had in fact been done towards the actual constructionof its track prior to that date. But that was perhaps not essential. The corporation was in fact organized, in a certain sense. It had done, prior to that date, corporate acts, some of them important, and others of little moment; but, all considered, they make it apparent it was a corporation for some purposes. This much may be fairly conceded. But it must be remembered, that so far as any organization was perfected, it was for the purpose of constructing a railroad exclusively for carrying passengers between Chicago and Evanston, with the right to use only animal power within the limits of the city of Chicago, as will

FORFEITURE FOR NON-ORGANIZATION.

more fully appear further on in the discussion, and not a railroad for general business, both freight and passenger, using steam as a motive power. If the latter is the character of the corporation, then it was not organized as such a corporation prior to the adoption of the present constitution of the State, and certainly no one can claim it was in operation as a corporation for the construction of a railroad for general business, within ten days after that instrument took effect. The utmost any one insists upon is, that in 1870, when the constitution took effect, the company was organized to construct a horse railroad within the city of Chicago. If the corporation can be construed to be one for the construction of a railroad for general business both in freight and passengers, then it cannot be insisted, with any show of reason, it was in operation for such purpose within ten days after the taking effect of the constitution, and hence the charter could have "no validity or effect whatever."

COMPANY'S POWERS LIMITED BY EXTENT OF ITS ORGANIZATION.

But a point is made that ought, in my judgment, to warrant relief against the proposed action of the Evanston company under the ordinance of 1883. It is, that, conceding the charter of the Chicago & Evanston R. Co. is still in existence, and has force notwithstanding the adoption of the constitution of 1870, its road, since its acceptance of the ordinance of 1864, is, and can be, nothing more than a street railway within the limits of the city of Chicago, to be operated by animal power—and the company cannot lawfully operate such cars by steam, as is proposed to be done under the recent ordinance. By its original charter the company was authorized to operate its cars with animal or steam power, at its option. It also had authority, under that act, to connect with the North Chicago Horse R. Co., or any other company, and make running arrangements with such companies. It is recited in the preamble to the ordinance of August 17, 1864, the Chicago & Evanston R. Co., under its charter of 1861, was authorized to locate, construct and operate a railroad, with horse power or locomotive cars, from Chicago to Evanston; that the company, in pursuance of such leave, commenced the location of their road, and desired to locate upon a route described: it was therefore ordained that permission be given the company to lay a single or double track railway on a certain route, and to keep, maintain, use and operate thereon railway cars and carriages, in the manner and upon the conditions set forth and required by the various ordinances passed and now in force in relation to the Chicago City R. Co. and the Chicago West Division R. Co., except as the same were by that ordinance modified. The railways to which reference is made in section 1 of the ordinance were both street or horse railways, for the exclusive purpose of carrying passengers, and upon which animal power was used to move cars. Notwithstanding this fact was well known, the mayor

HORSE RAILWAY OR STEAM RAILWAY.

of the city hesitated, and refused to approve the ordinance, on account of certain doubts, which he entertained in relation to the proper construction of such ordinance, and on account of certain objections; and for the purpose of removing such doubts and objections, the board of directors of the company, by resolution, declared "that it was the intention, and is the proper construction of said ordinance, that the Chicago & Evanston R. Co. should operate the cars and carriages used upon their railway tracks within the limits of the city of Chicago, with animal power only, and that said railway company should not connect with any other railroad on which any other power was used;" and also further declared, by a resolution of the same series, "that the said ordinance, subject to the aforesaid construction of the same," was accepted by the company. On the presentation of a certified copy of these resolutions, with others adopted at the same time, the mayor approved the ordinance. In the act of 1865, entitled "An act concerning horse railways in the city of Chicago," this ordinance is referred to, in section 3, as an ordinance of the common council of the city of Chicago, entitled "An ordinance concerning the maintenance and operation of the Chicago & Evanston railroad in the limits of Chicago," as having been passed on the 17th day of August, 1864 and it was by that act confirmed, and it was declared, "it shall be deemed and held to confer on the Chicago & Evanston R. Co. power and authority to construct and operate their road in the streets and over the bridge, as therein mentioned, until the same is altered, changed or amended by the common council, with the consent of the company."

It is conceded that section 3 of the act of 1865, concerning horse railways in the city of Chicago, is an amendment to the original charter of the Chicago & Evanston R. Co., as passed in 1861; and I am inclined to adopt as correct the suggestion of counsel for defendants: "It might be said that thereby this ordinance became a part of the charter of the railroad corporation. As the ordinance had been accepted by the railroad company, it was a legislative approval of such acceptance." It is expressly referred to in the act of the legislature by its title, and is confirmed, and it is declared it shall be deemed to confer authority upon the company to construct and operate its road as in the ordinance mentioned. How was it to be operated? It was as other street railways were to be operated, and the company conceded, by a resolution, that was animal power alone, and that it could not connect with any other railroad that used any other power. By the passage of the amendatory act of 1865, the Chicago & Evanston railroad became a street railway within the limits of the city of Chicago, precisely as were the Chicago City railway and the Chicago West Division railway, and could only be operated by animal power. Had the company laid its track and put its road in operation under

the amendatory act of 1865 and the ordinance of 1864, no one would contend it would have been anything but the usual street railway, to be operated by animal power, and to be used exclusively for carrying passengers. It is too evident to need illustration, that under that act of the legislature and that ordinance of the city, which became a part of the charter of the company by being incorporated in the act of 1865, it had no lawful authority to construct any other kind of a railroad. To all intents and purposes it was then merely a street railway within the limits of the city of Chicago, and nothing else, whatever it was between that city and Evanston. Since then there has been no legislative amendment to the charter of the railroad company. Nor can there be any amendment by special law, under the present constitution of the State. It remains precisely as it was after the passage of the act of 1865. That amendment was inconsistent with the original charter of 1861, in that it restricted the motive power within the corporate limits of the city of Chicago to animal power. So far as the two acts were or are repugnant, the latter act operated, by implication, as a repeal of the former.

The railroad that is proposed to be constructed, under the ordinance of 1883, by the Chicago & Evanston R. Co., is not what is known as a street railroad, which is limited to carrying passengers, usually, within the limits of the city, but the proposed road is one for the transaction of a general business, both freight and passenger, using steam as a motive power. The company is authorized to run over the tracks, within the limits of the city of Chicago, trains consisting of not more than thirty cars, and the only restriction as to the number of trains that may be run, is, that regular trains shall be run at least ten minutes apart, and not oftener. Obviously a corporation exercising or proposing to exercise such extraordinary powers must have a franchise emanating from some source capable of granting it. Whence has the Chicago & Evanston R. Co. such a franchise? Surely it did not emanate from the State. The grant from the State was to construct, maintain and operate what is known as a street railway, for carrying passengers and using only animal power. It is not claimed by any one that a municipal government can grant a corporate franchise. All francises, as is well known, emanate from the sovereign power, and in the American States emanate from the government, and owe their existence to a grant, or exist by prescription, as at common law, which presupposes a grant. A municipal body, it is understood, possesses no power to grant a franchise, in the technical sense that term is used in the law. Nor is it claimed the city of Chicago, under powers derived from the general incorporation act, under which it is organized, can re-create a street railway company, and endow it with additional franchises to do a general railroad business, both freight

FRANCHISE MUST EMANATE FROM SOVEREIGN.

and passenger, in cars moved by steam, over the same track. A horse railway in the street of a populous city, carrying only passengers, and an ordinary steam railway transacting the customary business of such a road, are distinct and essentially different corporations. The franchises possessed by such corporations are not the same.

It is admitted that on the passage of the act of 1865, and its acceptance, within the city of Chicago the Evanston company was to be regarded as a horse railroad, as distinct from a steam railroad. How has it been changed from a horse railroad to a steam railroad? No source of power is suggested for this particular railway company to transact the general railroad business within the city of Chicago, using steam as a motive power, other than city ordinances. What authority is there in the municipal government to enact or ordain these ordinances, under which the company proposes to construct, maintain, and operate its railroad within the limits of the city? The only semblance of power is section 3 of the act of 1865, entitled "An act concerning horse railways in the city of Chicago," and even that seems so slight as hardly sufficient to sustain any plausible argument in support of the validity of the ordinances. That section declares the ordinance passed August 17, 1864, "shall be deemed and held to confer on the Chicago and Evanston R. Co. power and authority to construct and operate their road in the streets and over the bridge mentioned therein, until the same is altered, changed, or amended by the common council, with the consent of the company; and such ordinances may, from time to time, be changed, altered, or amended, and such other provisions be made, as to the common council may seem proper, and be agreed to by said company." The railroad authorized to be constructed and operated within the city of Chicago by the ordinance of 1864 was simply a street railway for passengers, and it was confined to the use of animal power in moving its cars. Can it be contended, with any show of reason, the provision in section 3, "such ordinance may, from time to time, be changed, altered, or amended," and "other provisions made," confers power on the city council, ten years hence, to change the horse railroad so incorporated into a steam railroad, and endow it with franchises as such corporations usually possess? If such extraordinary powers exist in this provision, the subject is not expressed in the title of the act, and the omission, under the constitution of the State, would be fatal, and it would be inoperative. The title of the act is, "An act concerning horse railways in the city of Chicago." No subject in relation to railways for the carrying of freights and passengers in the manner usually done by steam railways, is embraced in that title. The words used will bear no such construction. It is therefore apparent, if, in the body of the act, any subject in relation to steam railways is embraced, it is without authority by law. But aside from

SUBJECT AND TITLE OF ACT.

this view, it is not thought the provision contained in section 3 is broad enough to give the city council power to authorize what is conceded to have been a "horse railway" under the act of 1865, to become a "steam railroad" for the transportation of all business done in freight and passenger cars. The power given is, "such ordinance may, from time to time, be changed, altered, or amended." Changing such ordinance has reference to making other provisions than as therein mentioned, for the running and management of a horse railroad. No other kind of a railroad was mentioned. Power to make changes in this ordinance for the running of a horse railroad in the city certainly does not, by any fair or reasonable construction, include power to create a steam railway doing a general railroad business, both passengers and freights, over the same route or elsewhere in the city.

It is said that at the time of the passage of the ordinance of 1883, there was no restriction whatever upon the Evanston road as to the use of steam,—that these restrictions that previously existed ceased by the ordinance of 1872. If it is true that after the passage of that ordinance little or nothing of the ordinance of 1864 remained, how does that affect the act of the legislature of 1865? That act made the Evanston road a horse or street railway within the limits of the city of Chicago, and certainly the city council had no authority to convert it into a railway for all purposes. All railroad franchises come from the State, and how could the common council, under power to amend an ordinance in relation to a horse railroad, create a railway for all purposes within the limits of the city, over the same route, or elsewhere within its jurisdiction? Such a proposition, if insisted upon, would certainly have very little in its support. But aside from this view, there is great force in the suggestion of counsel that the ordinance of 1883 does not purport to be an amendment, change, or alteration of the ordinance of 1864, or, indeed, of any other ordinance. If valid, it confers new and independent power upon the railroad company without any sort of reference to the former ordinances, and it is in no sense an amendment to any former ordinance or ordinances. It might be conceded the provisions of the ordinance of 1872 constituted an alteration or change in the ordinance of 1864, so far as it related to the use of steam by the railroad company, and yet that would fall very far short of sustaining the position taken, the company may use steam on a railway for all purposes, over the route described in the ordinance of 1883. Prior to the passage of the act of 1872, it is conceded that within the limits of the city of Chicago the Evanston road was nothing more than a street railway, to be operated by animal power. That ordinance did not purport to change the character of the railroad to be constructed in Hawthorne avenue, from a street railway into a railway for all purposes. The utmost it can be claimed it did, was to allow the use of steam instead of animal power. The track in

Hawthorne avenue was restricted or limited to the use of passenger cars only, and the ordinance of 1872 simply authorized, so far as the track in that street is concerned, the use of steam instead of animal power in moving its passenger cars. It seems clear, first, the Chicago and Evanston R. Co. has no authority from the State, under the act of 1865 or any subsequent act, to construct, maintain and operate any railroad other than what is commonly known as a street railway, within the limits of Chicago; and second, so far as the ordinances of 1872 and 1883, or either of them, purport to endow the railroad company with franchises to construct, maintain, and operate a railroad for all purposes, by steam, they are not within any power conferred on the city council by the act of 1865 or the general law under which the city is now organized, and to that extent they ought to be regarded as inoperative.

BRIDGING NAVIGABLE STREAM.

The question made as to the authority of either corporation to construct a railroad bridge over the Chicago river at the point indicated in the ordinance of 1883, needs only a brief discussion. The Chicago and Lake Superior R. Co. is incorporated under the act of 1872, in relation to incorporation of railroad companies. Section 19 of that act expressly authorizes any company organized under its provisions, to cross any stream, and to erect a bridge for laying rails, and running cars thereon. So far as any license from the city to bridge the Chicago river is necessary, it is fully given by the ordinance of December 24, 1883. The company then has a franchise from the State, and a license from the municipal corporation within which the river is, to construct the bridge in question, and that would seem to be all the law requires, in any view. Congress has never assumed exclusive control over the Chicago river. The State has been permitted to control it. It seems to be conceded by a uniform line of decisions, that legislation in respect to local matters, affecting only certain localities, will be left to the State, and that duty may be, and is often, devolved by the State on local municipal governments. It is well known that in some instances the State and general government may exercise concurrent jurisdiction, and until the general government sees proper to act, state legislation is warranted. Concurrent jurisdiction exists, no doubt, in the Federal government and in the State, touching the control of the Chicago river, located, as it is, wholly within the jurisdiction of the State, and until Congress shall assume to act, the State has competent jurisdiction to legislate concerning it. Harmon *v.* City of Chicago, 110 Ill. 400; Escanaba Co. *v.* City of Chicago, 107 U. S. 678. As the Chicago and Lake Superior Co. has authority both from the State and municipal government to construct a bridge over the Chicago river, its right to do so would seem to be complete; but that authority must be a barren right until the company shall in some lawful way obtain the

SAME—AUTHORITY FROM SOVEREIGN NECESSARY.

right to construct its track to and from the river bank. Until that is done, a bridge at the point in question would be of no practical utility. It would, in some degree, at least, no matter how well constructed, be an impediment to the navigation of the river, and its existence ought not to be permitted until demanded by public convenience for railroad travel and overland commerce.

Without discussing the question at length, I am of opinion the Chicago and Evanston R. Co. has no authority, under its charter or otherwise, to construct a bridge over the Chicago river at the point in controversy. I do not find that the State has conferred upon it any such right, and the city council of Chicago possessed no power to grant such a franchise, under the general law or otherwise.

In my judgment the decree should be reversed, and relief granted, substantially, at least, as asked in the bill.

PENNSYLVANIA R. Co.

v.

DUNCAN.

(111 *Pennsylvania State*, 352.)

The 8th section of the 16th article of the constitution of Pennsylvania includes all corporations falling within the terms of the constitutional amendment of 1857, and also to those falling within the terms of the Act of May 3, 1855, P. L. 428.

The Pennsylvania R. Co. derives its authority to build the branch railroad from the western side of the Schuylkill river to Fifteenth street, Philadelphia, from the Act of May 16, 1857, P. L. 519. It is therefore subject to the Act of May 3, 1855, if not to the amendment of 1857.

The Pennsylvania R. Co. accepted as part of its charter the Act of April 4, 1868, and so became subject to the constitutional amendment of 1857, and as a consequence to the legislative power of the General Assembly.

The power of the Constitutional Convention to amend the charter of a corporation was the same as that of the General Assembly.

The Pennsylvania R. Co. had at the adoption of the Constitution of 1874 no vested charter rights which would prevent its becoming subject to the provisions of the 8th section of the 16th article of said constitution.

A common-law action can be maintained against a corporation for an injury done to private property in the exercise of the right of eminent domain.

Where the legal right is vested in a trustee all actions at law which affect the trust must be brought his name.

Monongahela Navigation Co. v. Coon., 6 Barr, 379, followed.

ERROR to the court of common pleas No. 2, of Philadelphia county: Of July Term, 1884.

Before MERCUR, C.J., GORDON, PAXSON, TRUNKEY, STERRETT, GREEN and CLARK, JJ.

This was an action of trespass on the case brought by George R. Duncan against the Pennsylvania R. Co., June 6, 1881, to recover for damage done by the defendant to his real estate situate on the northeast side of Filbert street, and extending from Twenty-third street to the Schuylkill river, Philadelphia.

He alleged in his *narr* that he suffered damage to his property from the construction and operation of the defendant's railroad, as follows:

From the construction of an abutment and pier in the Schuylkill river opposite Filbert street; from the noise, burning cinders, smoke, dust, and dirt incident to the operation and use of the railroad aforesaid; by deprivation of his use of Filbert street as a highway and of four hundred feet of building front on said street; and by deprivation of free access to the wharves on the Schuylkill front of his property. The defendant pleaded generally to the *narr*, and also specially to the effect that the said the Pennsylvania R. Co., by its charter and by certain acts of the General Assembly of the Commonwealth of Pennsylvania, passed prior to the adoption of the present state constitution, was invested with the right to construct the railroad aforesaid, and was therefore not liable for such damages as were alleged in the *narr* as the price of the exercise of such right.

On the trial before FELL, J., the following facts appeared:

In 1876 George R. Duncan, plaintiff in this case, became the owner by purchase at sheriff's sale of a property situate at the northwest corner of Twenty-third and Filbert streets, Philadelphia, containing two hundred and thirty-one feet on Filbert street, and extending westward some four hundred and twenty-four feet to the low-water mark of the Schuylkill river. This property had been owned by the Girard Tube Works, and the improvements consisted of a large main building on the south side of the lot, extending from Twenty-third street along Filbert street towards the river, together with coal sheds and other outbuildings.

In 1880 and 1881 the Pennsylvania R. Co. built what is known as the Filbert-street extension, crossing the Schuylkill river a short distance above Market street, and ending at Broad street. It was opened for freight in April, 1881, and for passengers on the 5th of December the same year.

From a point near Twenty-first street the properties on the south side of Filbert street were purchased, the buildings removed, and a substantial structure sustained by transverse arches erected, upon which the tracks were laid. From Twenty-first street west to the river, the tracks were laid upon a structure of wooden and iron beams directly over the cartway of the street, and sustained by iron pillars some eighteen inches square, resting upon the foot-

way inside of the curb line. This is the case along the whole length of the south side of the plaintiff's property, the structure being some forty feet high, and the railings or guards coming within one or two feet of the side of the building.

Plaintiff offered in evidence plans produced by the defendant on call of the plaintiff, showing, first, the elevation of the railroad in front of the plaintiff's property: second, ground plan of the tracks; third, ground plan of plaintiff's property in connection with the tracks.

Six photographs of the locality in question were also offered in evidence by plaintiff. None of the plaintiff's property was actually taken by the railroad company.

The difference in value of the entire property before the road was built and after it was completed was placed at about $50,000 by the plaintiff's witnesses, while the defendant's witnesses placed the depreciation in value as small, if anything at all.

The defendant admitted that it erected and that it operates said railroad, and that said railroad was in operation at the time of the bringing of this suit. The defendant also offered in evidence its charter approved April 13, 1846, P. L. 312; also Act of Assembly, entitled "An act for the sale of the Main Line," approved May 16, 1857, P. L. 519; also deed poll of the Commonwealth to the defendant for the "Main Line;" also resolution of the stockholders of the defendant accepting the provisions of said Act of May 16, 1857; also Act of Assembly approved March 27, 1848, P. L. 273.

The plaintiff then offered in evidence Act of Assembly approved April 4, 1868, P. L. 58, which it was admitted had been accepted by the defendant on the 11th of April, 1868; also an ordinance of the council of the city of Philadelphia, entitled "An ordinance to authorize the Pennsylvania Railroad to occupy a portion of Filbert street for railroad purposes."

The defendant offered to prove that by its representatives it had appeared before the law committee of councils of the city of Philadelphia and asserted and argued their unquestioned right, independent of any assent of the city, to construct the extension, for the purpose of rebutting any presumption which may possibly arise that the Pennsylvania R. Co. in any manner became a party to the ordinance of the city authorities referring to the construction of the structure complained of in this suit. Objected to. Objection sustained. Exception. (Eighth assignment of error.)

The defendant offered to prove that the plaintiff has no interest individually in the property alleged to be injured, but that he holds as a naked trustee for certain national banks of Pittsburgh. Objectod to. Objection sustained. Exception. (Tenth assignment of error.)

The defendant presented the following points:

1. Under all the evidence in this cause, the plaintiff is not entitled to recover damages against the defendant for any alleged injury to his property by the construction of its Filbert-street extension or branch in the form of action adopted in this cause, another remedy for any such damages having been given by the charter of the defendant and the supplements thereto in evidence. Refused. (Ninth assignment of error.)

2. The defendant, under its charter and supplements in evidence, had full lawful authority to erect and operate the said Filbert-street extension or branch, and in doing so had the right to occupy Filbert street longitudinally, without incurring any liability by reason thereof to the plaintiff as owner of property abutting on said street.

3. The defendant, as purchaser of the main line of the public works of this State, under the Act of Assembly and deed in evidence, had full lawful authority to erect and operate the said Filbert-street extension or branch, and in doing so had the right to occupy Filbert street longitudinally, without incurring any liability by reason thereof to the plaintiff as owner of property abutting on said street.

4. There is no evidence in this case that the defendant ever entered into any contract with the city of Philadelphia, relating to the construction of said Filbert-street extension or branch, or ever sought any authority from said city for such construction.

5. Under all the evidence in this case, the verdict must be tor the defendant.

These the court answered in the general charge as follows:

The court reserves for the consideration of the court in banc the first, second and third points of the defendant, and refuses to charge as requested in the defendant's fourth and fifth points. The court submitted the case to the jury simply upon the question of damages, saying in the general charge, *inter alia*, "The right to recover indirect or consequential damages against a corporation for injuries done to private property in the exercise of the right of eminent domain delegated to it by the State is a new one in Pennsylvania. being secured by the constitution of 1873. The liability of the corporation defendant here depends upon whether or not it is subject to the provisions of the new constitution. This is a question of law entirely, and, as such, will have to be determined in the case. I have decided to reserve it, and submit the case to you simply upon the question of damages."

Verdict for the plaintiff for $20,000, subject to the points reserved.

The court entered judgment for the plaintiff on the verdict and the points reserved, refusing a motion to enter judgment for the defendant on the points reserved, *non obstante veredicto*, whereupon the defendant took this writ, assigning for error the ruling on

the evidence before shown, the several answers to its points, the refusal to enter judgment for the defendant on the points reserved *non obstante veredicto* and the entering judgment for the plaintiff on the verdict.

Wayne McVeagh for plaintiff in error.

M. Hampton Todd and *George W. Biddle* for defendant in error.

GORDON, J.—We fully agree with all that has been said by the learned counsel for the plaintiff in error as to the inviolability of the charter of the Pennsylvania R. Co. We not only now assent, as we always have done, to the principle announced by the Supreme Court of the United States in the Dartmouth College case, but are perfectly aware that whether we so assent or not, we must, as a subordinate jurisdiction, give to that case its proper effect. We also agree, that the framers of the constitution of 1874 did not intend to violate the laws of the federal government, or to repeal the provisions of any charter theretofore granted by the legislature of Pennsylvania. It follows, that a protracted discussion of these points would subserve no valuable purpose. Nevertheless it seems to us as of no avail to deny the plain and obvious reading of sec. 8, art. 16, of the present constitution: "Municipal and other corporations and individuals, invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways, or improvements, which compensation shall be paid or secured before such taking injury or destruction." It is admitted that the then existing municipal corporations are included in this provision, and that no language is elsewhere found in the constitution or its schedule which exhibits an intention to exclude them from the restriction thus imposed. But, confining ourselves to the words of this section, we are unable to comprehend the force of the reasoning which would exclude "other corporations" from the conditions to which their immediate correlatives have been subjected. Moreover, if we have regard only to the grammatical structure of the sentence, the doubt would be not as to the intention to embrace corporations then existing, but rather future ones. The word "invested," standing as it does alone, has undoubtedly a present signification, and cannot be made to embrace the future but by the addition of some verbal auxiliary. Thus, while we have no doubt of the design to apply the provisions of this section to corporations which should thereafter be erected, yet can we by no possible construction exclude those then in being. The answer, however, is, that the section under discussion, by the express terms of the constitution itself, was not intended to apply to private corporations existing at the time it was framed, and the 10th section of article

CONSTITUTIONAL PROVISION CONSTRUED—TO WHAT CORPORATIONS IT APPLIES.

17 is cited in support of this hypothesis: "The General Assembly shall not remit the forfeiture of any corporation now existing, or alter or amend the same, or pass any other general or special law for the benefit of such corporation, except upon the condition that such corporation shall thereafter hold its charter subject to the provisions of this constitution." But we assume, without fear of contradiction, that the provision here stated was not intended to apply to those corporations which could not claim exemption from what we may call constitutional legislation; in other words, such as from the nature of their charters must necessarily come within the provisions of this new organic law. It would be folly to call upon such to accept that concerning which they had no choice. Therefore, all corporations falling within the terms of the Act of 1855, or the Amendment of 1857, are, so far as the provisions of that statute or that amendment extend, concluded by the action of the convention of 1873. Beyond this, however, its prescriptions neither did nor were intended to go, and so we have held in Hays *v.* The Commonwealth, 82 P. S. R., 518 and subsequent, cognate cases. We may also add, in order to avoid the possibility of mistake. that the power of the convention was, in this particular, no greater than that of the legislature. The defendant's chartor must be regarded in the light of a contract, and is in all particulars inviolable, unless in the charter itself, or in some general or special law to which it was taken subject, there is a power reserved to the General Assembly to alter or amend, and as in that case the legislature might intervene to modify the charter of a corporation, so might the constitutional convention.

Whence, then, did the Pennsylvania R. Co. derive its authority to build the branch from the western side of the Schuykill to Fifteenth street? Certainly not from the Act of 1846, for that act gave it a charter which embraced only the power to build and operate a road running from Harrisburgh to Pittsburgh, but rather, as the counsel for the defendant below contends, from the Act of the 16th of May, 1857. This act, *inter alia*, reads as follows: "That any company already incorporated by this Commonwealth, becoming the purchaser of the said main line, shall possess, hold and use the same under the provisions of their act of incorporation, and any supplement thereto, modified, however, so as to embrace all the privileges, restrictions and conditions granted by this act in addition thereto." This gave to the Pennsylvania Co. a new charter containing all the privileges of that of 1846, and it was under the rights thus conferred that it built, and now operates, the branch in question. In this we, without hesitation, concur with the learned counsel for the defendant, who contends that the company was not driven to the necessity of resorting to the Act of 1874 for the power to build its branch, but possessed that right under the privileges conferred

SOURCE OF AUTHORITY TO BUILD BRANCH.

by its original charter as extended by the Act of 1857. The question here raised was fully discussed and settled in McAboy's Appeal, argued at Pittsburgh, November 3, 1884, (11 Out. 548), and needs no further discussion.

But if the defendant's charter dates from 1857, it would seem to be clear that it was taken subject to the Act of May 3, 1855, if not the amendment of 1857, and if so, that act must be taken as part of the charter. "Every charter of incorporation," says the statute, "granted, or to be granted, shall be deemed and taken to be subject to the power of the legislature, unless expressly waived therein, to alter, revoke or annul the same whenever in their opinion it may be injurious to the citizens of the Commonwealth, in such manner, however, that no injustice shall be done to the corporators, and as fully as if the reservation of said power had been therein expressed.

That under this act the legislature has the power to alter all charters granted subsequently to its passage there can be no doubt, and no reason has been given why the charter of the defendant should be exempted from its provisions. The allegation that it was so exempted by reason of its purchase of the main line of the public works cannot be sustained, for we find nothing of the kind in the act relative to the sale of those works. By that purchase it got, in addition to its right to hold and operate the main line of the state improvements, what was equivalent to a new charter, by which powers not conferred by the sale itself were vested in it, and surely it took those powers subject to the Act of 1855. The conclusion here stated cannot be avoided but by showing that the new grant was accompanied by an express renunciation of legislative jurisdiction. Nor must we pass unnoticed the fact that this company accepted, as part of its charter, the Act of the 14th of April, 1868, and so became subject to the constitutional amendment of 1857, and, as a consequence, to the legislative power of the General Assembly. We thus find that the legal status of the Pennsylvania Co., at the time of the adoption of the constitution of 1874, was in all respects similar to that of the Monongahela Navigation Co. at the time of the passage of the Act of 1844, so that we may regard the case of that company against Coon, reported in 6 Barr, 379, as decisive of the controversy in hand. The corporation here mentioned was erected in 1836 without the imposition of any conditions respecting such consequential damages as might result from the construction of its works. On the 24th of June, 1839, a supplemental act was passed by which certain new privileges were granted to the company, and in the last section of that act the legislature reserved to itself the right "to alter, amend or annul the charter, in such manner as to do no injustice to the stockholders." Now, we may pause here for the moment to observe the similarity of the language thus

POWER TO ALTER CHARTER.

used to that found in the act of 1855, and the amendment of 1857, and to remark that this reservation of legislative power is as well part of the defendant's charter as it was that of the Monongahela Navigation Co. "Every charter of incorporation granted, or to be granted, shall be deemed and taken subject to the power of the legislature, unless expressly waived therein, . . . as fully as if the reservation of said power had been therein expressed." The similarity of the position of the two companies with reference to the subject-matter under consideration is thus rendered certain, and the decision which determines the liability of the one must also, if adhered to, settle that of the other. In 1842, Coon *et al.* brought their suit for damages resulting to them from the water backed by the defendant's dam on their mill-wheels, but the court refused to sustain this action, for the reason that this *locum tenens* of the State was not liable for damages of this character. So the matter stood until 1844, when the General Assembly enacted, "that the company shall make amends for any damages done, or that may be done, to lands and property on the Monongahela river, or its branches, or its tributary streams, by overflowing the same." Under this act the plaintiffs brought a new action for the same damages as those claimed in the former suit, and it was held that they were entitled to recover. It must here be observed, that not only was the same defence open to the company in the case cited, as that now urged for the defendant in the present contention, but to the further defence that the Act of 1844 was retrospective in its operation and imposed damages for which the courts had previously declared the Navigation Co. was not liable.

Nevertheless, Chief Justice Gibson, who delivered the opinion of this court, thus disposes of the controversy: "Now, it has already been determined that the case before us was not provided for in the original act of incorporation; and had it continued to stand on that foot, the power of the State would have been incompetent to burden the company with charges not originally imposed on it. But in 1839 it accepted a grant of further powers and privileges, in consideration of an express reservation by the legislature of the power 'to alter, amend, or annul the said charter of said company, at any time thereafter, in such manner that no injustice be done to said corporation;' and in execution of it, they declared, in 1844, that the company 'shall make amends for any damage done, or that may be done, to lands or property lying upon the Monongahela river, or its branches and tributary streams, by overflowing the same.' It is evident that, by accepting additional privileges and powers on the terms prescribed in the grant to them, the company surrendered the inviolability of its contract to the discretion of the legislature. How this discretion has been exercised it is not for us to say; but if we were bound to do so, we would promptly say

that it has, in the words of the declaratory act, done no injury to the company."

We have thus a complete disposition of the case in hand, without resorting to the argument, which to us seems fallacious, that the constitution only provides a remedy for the enforcement of a pre-existing right; hence, does not infringe the company's charter powers. The error discoverable in this position is, that there was no such pre-existing right as against the Commonwealth, and those upon whom she had conferred the right of eminent domain, and so it was held by all the cases, from Shrunk *v.* The Navigation Co. down to the Lycoming Gas & Water Co. *v.* Moyer, 3 Out. 615. On the other hand, whilst this provision does not in terms abridge the defendant's right of eminent domain, yet it does encumber the exercise thereof, and thus alters or modifies its charter.

We, therefore, rest our decision on what we deem its legitimate ground, that is, that the Act of 1855, and the constitutional amendment of 1857, must be taken to be as much part of the defendant's organic law as though written therein, and, as a consequence, as well the constitutional convention, as the legislature, had the power to subject the company's exercise of the right of eminent domain to the provision that it make just compensation, not only for the property which it might choose to take, in the strict sense of that word, but also for such as it may injure or destroy.

What we have already said substantially disposes of all the assignments of error except the ninth and tenth, and they are comparatively unimportant. It is certainly idle to urge that a remedy is given in the defendant's charter for the injury here complained of, when, throughout the case, the contention on part of the company has been that no means of redress for such injury exist either in or out of the charter. Moreover it is not pretended that the constitutional provision, which requires compensation for property injured before such injury, has been complied with either by payment or security. The case thus falls within the doctrine announced in Dimmick *v.* Broadhead, 25 P. F. S. 464, and McClinton *v.* The Railroad Co., 16 Id. 404. The tenth assignment is answered by saying: Where the legal estate is vested in a trustee, all actions at law which affect the trust estate must be brought in his name: Perry on Trusts, 3d ed., vol. 1, sec. 328. To prove, therefore, that the plaintiff, in the suit in hand, had individually no interest in the property, but held only as trustee for certain national banks in the city of Pittsburgh, could have no result legitimately helpful to the defendant's case.

The judgment of the court below is affirmed.

PAXSON and GREEN, JJ. (dissenting).—We dissent. We are unable to see how the State can avoid its solemn contract by amending its constitution.

East Alabama R. Co.

v.

Tennessee and Coosa Rivers R. Co.

(78 *Alabama*, 274.)

On the former appeal in this case (75 Ala. 516–30), it was decided that the plaintiff corporation had established its right to recover so much of the railroad, with right of way and superstructure, as it had located, cleared and graded at the time of its conditional sale and transfer to the purchasing corporation from which the defendant derived title; that said purchasing corporation, acquiring its possession and rights under said conditional sale and conveyance, was estopped from denying that plaintiff had ever procured the right of way from the owners of the freehold; that this estoppel was equally binding on the defendant, a derivative purchaser from said purchasing corporation; and that neither of subsequent bankruptcy of the purchasing corporation, nor the sale of the road under the proceedings in bankruptcy, nor the foreclosure and sale of the property under the mortgage in trust for the bondholders, impaired plaintiff's right of recovery. The court adheres to these conclusions as then announced, without re-examination of the questions involved.

The defendant corporation in this case, having acquired its possession and title to said railroad property from the corporation which bought from the plaintiff, is equally bound by the estoppel; but this estoppel only extends to the five miles of road between Attalla and Gadsden, which had been surveyed, located, cleared and graded at the time said sale and purchase was made. As to that portion of the road which lies between "Christopher's Cut" and the Coosa river, a gap of about one mile, the evidence does not show that plaintiff, at the time said contract of sale was made, had acquired the right of way, or had definitely surveyed and located the road, or was in possession by any visible marks of ownership; and even if the purchasing company were estopped from denying that it acquired this portion of the road under its contract of purchase from plaintiff (which is not decided), the estoppel would not be operative against parties claiming under a mortgage executed by the purchasing company before the contract was made, but after said company had located and graded this part of the road as a portion of its own line.

The right of way for a railroad is an easement—an interest in the freehold; and it can only exist in grant or by prescription.

Appeal from the circuit court of Etowah.

Tried before the Hon. Leroy F. Box.

This action was brought by the Tennessee & Coosa Rivers R. Co., a corporation chartered by an act of the General Assembly of Alabama, approved January 16, 1844; and was commenced on the 23d June, 1880. The East Alabama R. Co., a corporation created under the general laws of the State on the 12th June, 1880, was made a defendant on its own motion, as the landlord of the original defendants; and pleaded the general issue, with several special pleas

(which require no special notice), and also made a suggestion of adverse possession for three years and the erection of valuable improvements; and the cause was tried on the several issues joined. The property sued for was thus described in the original complaint. "The following real estate—that is to say, the track or road-bed of the plaintiff as the same was located at and before July 12, 1871, from Gunter's Landing, in Marshall county, in the State of Alabama, to Gadsden, in Etowa county in said State, together with all their right of way, grading, trestles, masonry work, culverting work, and property on said line so located, including the railroad from Gadsden to Attalla, in said county of Etowah, as now used and operated by the defendants; which railroad is the only railroad from Gadsden to Attalla, and is attached to the soil, and is now, and was at the commencement of this suit, used and operated as a railroad by the employees of the defendant corporation, and by the direction and authority of that corporation; and including also the appurtenances to said railroad from Gadsden to Attalla." By amendment of the complaint, that part of the property lying in Marshall county was struck out; and by a second amendment, allowed after the reversal of the judgment on the former appeal (75 Ala. 516), the property sued for was thus described: "The right of way along the whole line of said railroad as now located, completed and operated, from the point on the Coosa river between the base of Lookout Mountain and Ten Island Shoals, and within the corporate limits of Gadsden, to Attalla and the Alabama Great Southern railroad; the said right of way being one hundred feet in width," etc. The verdict of the jury, under the charges of the court, was in these words: "We, the jury, find all the issues in favor of the plaintiff, and find the suggestion of adverse possession to be untrue; and we find that all the property sued for, and described in the complaint as amended, the railroad and the right of way from the Coosa river to Attalla, mentioned in the complaint as amended, was at the commencement of this suit, and still continues to be, the property of the plaintiff, except only so much of the curve at Attalla as is more than fifty feet from the centre of said railroad bed," etc.

On the trial, as the bill of exceptions shows, the plaintiff read in evidence a deed dated July 12, 1871, duly executed and delivered by it to the East Alabama & Cincinnati R. Co., conveying its right of way, franchise and property. The deed, after setting out a proposal to purchase made by the latter company, and the acceptance of that proposal by the former, continued thus: "Now this indenture witnesseth, that the said Tennessee & Coosa R. Co., by its president, by reason of the premises, hath granted, bargained, sold and conveyed, and by these presents doth grant," etc., "unto the said East Alabama & Cincinnati R. Co., the track or road-bed as at present located, from Gunter's landing in Marshall county, to

Gadsden in Etowah county, in the State of Alabama, of the said Tennessee & Coosa R. Co., together with all their right of way, grading, trestles, masonry work, culverting work and property on said line so located; in and for the consideration that the said East Alabama & Cincinnati R. Co. shall pay off and discharge the floating debt of the said Tennessee & Coosa R. Co., not to exceed the sum of $25,000—one fourth in money, and the remainder in the first mortgage bonds of said East Alabama & Cincinnati R. Co., indorsed by the State of Alabama, and numbering from 320 upwards; to have and to hold," etc. "Provided, however, that this deed is to have effect and be operative only upon the express condition and understanding that the said Alabama & Cincinnati R. Co. shall commence work on said line so above conveyed, at Gadsden, within seventy days from said 26th June, 1871; and that the road shall be completed, from Gadsden to Attalla, by the first day of October next, and thirteen miles from Gadsden, or to the foot of Sand Mountain, by the first day of January, 1872, and the whole road in two years from the first day of October, 1871; the bonds of said company to be indorsed by the State, to be taken at market value, not to be less than ninety cents on the dollar, and the money paid in seventy days from the delivery of this deed. The said East Alabama & Cincinnati R. Co. is to issue stock of the said East Alabama & Cincinnati R. Co., for the paid-up stock of the said Tennessee & Coosa R. Co., not to exceed $50,000. And provided, that the said East Alabama & Cincinnati R. Co. shall ratify and approve the contract made by Colt, Boyle & Co., with J. S. Pennington, president, for building the remainder of the East Alabama & Cincinnati Railroad from the city of Eufaula to Guntersville; said stock not to be issued until the road is completed to the foot of Sand Mountain, as above specified. In testimony," etc.

The East Alabama & Cincinnati R. Co. was originally incorporated in 1869 or 1870, under the name of the Eufaula, Opelika, Oxford & Guntersville R. Co.; and was authorized to construct a railroad from Eufaula, by Opelika and Oxford, to Guntersville. Before the purchase of said road from the Tennessee and Coosa Rivers company, it had commenced the work of building its road, and had executed a mortgage, or deed of trust, to W. H. Barnes and Henry Clews as trustees, to secure the payment of its first mortgage bonds, on which it would be entitled to the State's indorsement when the first twenty miles of its road were completed. The first twenty miles of the road, from Opelika northward, were completed, the State's indorsement of the bonds procured, and the bonds issued and used by the company; and after said contract of purchase was made, the company finished the five miles of road extending from the river at or near Gadsden to Attalla, where it made a connection with the Alabama Great Southern road. This

was completed before the 1st of October, 1871, the time specified in the contract of purchase; but no other work was done on the road, and the company was adjudicated a bankrupt in 1873. Under a decree rendered in the matter of the bankrupt estate, the franchise and property of the company were sold by the assignee, and bought by James I. Colt and his associates, to whom the assignees executed a conveyance, under the order of the court, dated May 14th, 1874. The Tennessee & Coosa Rivers R. Co. was not a party to the proceedings in bankruptcy; and the sale was made subject to the lien of the State on account of the indorsed bonds, and to the lien created by the deed of trust to Barnes and Clews. These purchasers took possession of the road, and continued to operate it until it was again sold, under a decree of the Chancery Court, under a bill filed by said Barnes and Clews to enforce and foreclose the deed of trust, and to adjust the priorities and conflicting claims of the different creditors.—See the case reported, Colt *v.* Barnes 64 Ala. 108. At the sale made by the register under the decree in that case, on the 5th of April, 1880, Perkins, Livingston and others became the purchasers, and received a conveyance from the register; and they organized themselves, on the 12th of June, 1880, under the general laws of the State, into a new corporation under the name of the East Alabama R. Co. The Tennessee & Coosa Rivers R. Co. was not a party to this chancery suit; and having entered on the land, for condition broken and failure of performance on the part of said original purchasing company, was dispossessed under the process of the court, at the instance of said Perkins, Livingston and their associates. This action at law was then instituted, June 23d, 1880, and the defendant corporation filed a bill in equity to enjoin its prosecution; but the bill was dismissed by this court on appeal, and the plaintiff's legal title sustained.—Tenn. & Coosa R. Co. *v.* East Ala. R. Co., 73 Ala. 426.

The facts above stated, which may be found stated with greater detail in the reports of the several decided cases as cited, were proved on the trial by the record of the proceedings in those cases. The plaintiff adduced evidence, also, showing the condition of the road-bed between Gadsden and Attalla on said 12th July, 1871, and the loss of a package containing conveyances of the right of way which it had previously procured; but no particular names or parcels of land were specified, and several exceptions were reserved to the rulings of the court in admitting this evidence. The defendant adduced evidence also, showing the work which had been done, after the 12th July, 1871, in extending the road from "Christopher's Cut" to the river; and produced several conveyances of the right of way along the route between those points, which the purchasing company had procured prior to June 12th, 1871.

On all the evidence adduced, which it is unnecessary to state at

length, the court gave the following (with other) charges to the jury:

1. "If the jury believed, from the evidence, that previous to the execution and delivery of said deed of July 12th, 1871, plaintiff had located a line from Wragg's mill through Gadsden to the Coosa river, by surveying and locating the same over the route where the road now runs, but had done no other work or grading on it; and that the East Alabama & Cincinnati R. Co. took such located route, road-bed and right of way, under said deed; the plaintiff may recover such part of the road from the defendant if the evidence in other respects entitles the plaintiff to recover, although the Eufaula, Opelika, Oxford & Guntersville R. Co. may have acquired rights of way from the land-owners in June, 1870, and graded the same, before said deed of July 12th, 1871, was executed; unless the defendants had been in the adverse possession of that part of the road for ten years before suit brought."

2. "Surveying a route for a railroad, and locating a line over it, and the adoption of the line so located by the proper authority of the railroad company as the route to be used in building it, made and constituted a road-bed, whether any grading or other work was done on the same or not; and the plaintiff in this action may recover, if the jury are satisfied from the evidence that such location was made prior to the execution of said deed of July 12th, 1871, if the evidence in other respects satisfies the jury to a reasonable certainty that the plaintiff is entitled to recover."

3. "The said deed of July 12th, 1871, embraced and included all the track, road-bed and right of way which had been located or graded by plaintiff previous to that time, between Attalla and the Coosa river at Gadsden."

The defendant duly excepted to each of these charges as given, and requested several charges in writing, among which were the following: (1) "As matter of law, on a construction of said conveyance of July 12th, 1871, neither the proposal of Barnes therein recited, nor the deed itself, contemplated the purchase or acquisition of any property within the corporate limits of Gadsden." (2) "The defendants, not being estopped from setting up any defence they can make, as to any property sued for which lies in Gadsden, if the jury believe that the said Eufaula, Opelika, Oxford & Guntersville R. Co., or the East Alabama & Cincinnati R. Co., before the date of said deed of July 12th, 1871, procured rights of way through Gadsden; then, though this location may have been on a line previously located by plaintiff, plaintiff cannot recover as to that part of the road in the corporate limits of Gadsden." The court refused each of these charges as asked, and the defendant excepted to their refusal.

The rulings of the court on the pleadings and evidence, the

charges given, and the refusal of the charges asked, are now assigned as error.

H. C. Semple and *W. H. Barnes* for appellant.

S. F. Rice, with *Denson & Disque, contra.*

STONE, C. J.—This case has been heretofore in this court, and the more important questions raised by the controversy were then decided. Tennessee & Coosa Rivers R. Co. *v.* East Ala. R. Co., 75 Ala. 516. We then decided that the plaintiff had established its right to recover so much of the railroad, right of way and superstructure, as it had located, cleared and graded, and that the East Alabama R. Co. had shown no valid defence to such claim. We held that, by the purchase from the Tennessee & Coosa Rivers R. Co., of its track or roadbed, togeher with the right of way, grading, trestles, masonry work, culverting work, and property on said line so located, the East Alabama & Cincinnati R. Co., acquiring its rights and possession under such purchase, was estopped from denying or disputing the titte under which it had acquired and held possession. This estoppel applied as well to the right of way as to the graded road-bed. It did not lie in the mouth of the purchasing company to assert, what the owners of the freehold failed to assert, namely, that in locating its road, clearing a right of way and grading the track, the Tennessee & Coosa Rivers R. Co. was a naked trespasser without right. The owners of the freehold raising no objection, no other person could. We held further that neither the bankruptcy of the East Alabama & Cincinnati R. Co., the sale of the road under the bankruptcy proceeding, nor the foreclosure and sale of the property under the mortgage to Barnes and Clews, impaired plaintiff's right of recovery in the ejectment suit. We will not re-examine these questions.

FORMER SUIT—EAST ALABAMA R. CO. ESTOPPED TO DENY ITS TITLE.

The present suit was tried on a complaint which originally claimed the entire railroad from Guntersville to Gadsden, and sought to recover it. It was finally narrowed down, until the claim was for that "part of the railroad from Gadsden to Attalla," in Etowah county, shown to be about five miles in length. In the first trial it was shown that, about the years 1854–5, the Tennessee & Coosa Rivers R. Co., under its act of incorporation, surveyed, located, cleared and graded its line of railway from a point where Attalla now stands, to a point near Wragg's mill, ending in a cut of some seven or eight feet, known as "Christopher's Cut," and near the then corporate limits of Gadsden. The proof was that this part of the railroad remained in this condition, without further work upon it, until the East Alabama & Cincinnati R. Co. took possession of it after the contract of purchase was concluded, July 12, 1871. After that time the purchasing company took possession of such graded road between

FACTS.

those points, and completed its construction. The rulings of this court were based on the state of the road, as above set forth. No ruling was invoked or made, except on questions relating to that part of the road which lay between "Christopher's Cut" and the place where Attalla stands, each portion of which was in substantially the same partially completed condition. The present record raises a question not presented on that appeal.

Between the terminus of the grading at "Christopher's Cut" and the Coosa river is a gap of near a mile, on which no work had been done by the Tennessee & Coosa Rivers R. Co., so as to change the surface, or give notice where the line would run. The timber was not cleared off, nor were there any embankments or excavations made. There is some testimony that the engineer, while locating the road in 1854–5, surveyed three lines from "Christopher's Cut" to the river, and set up stakes on each line of survey. There is also oral testimony, by persons who were near and about him, that he expressed a preference and selection of the line on which the road was subsequently built, as we shall hereafter show. The three surveys were left with set stakes, and nothing else, to mark their locality; and such stakes disappeared long before 1869. No report of any selection is shown to have been made by the engineer, nor is any action of the board of directors produced, showing a location of this part of the road. Further than the evidence furnished by these surveys, there is no proof of any possession of this part of the line by the Tennessee & Coosa Rivers R. Co. There is, also, imperfection and uncertainty in the attempted proof that this company had obtained the right of way beyond "Christopher's Cut." No paper title is shown, and there is no evidence that any ever was given. There is some oral testimony on the question, but it is indeterminate; and it is left in doubt, whether this relates to the whole, or to only a part of the line beyond "Christopher's Cut." Right of way for a railroad is an easement —an interest in the freehold—which can only exist in grant or by prescription. There are no facts shown on which to base any right to this part of the line in the Tennessee & Coosa Rivers R. Co., by mere prescription, and there is no proof that such right was ever acquired by grant or conveyance, so as to take it without the operation of the statute of frauds. Bro. Stat. Frauds, § 232; Washburn on Easements, 3d ed., 38 *et seq.*; Code of 1876, § 2121.

It is contended for appellee, that the East Alabama & Cincinnati R. Co. acquired its right, and went into possession, under its contract of purchase of July 12, 1871, and therefore is estopped from disputing the right and title of the Tennessee & Coosa Rivers R. Co., its vendor; and, that corporation being estopped, the present appellant, the East Alabama R. Co., having acquired all the title it has derivatively from that corpora- QUESTION OF ESTOPPEL.

tion, is equally estopped. On the former appeal in this cause, we held such was the true rule, to the extent the facts made it applicable. It is undoubtedly the rule as to all that part of the track and right of way, which had been graded and cleared by the plaintiff corporation, before the agreement of sale was entered into, July 12, 1871. Such was the proof, on the former trial, of the status of the work when the contract of sale was entered into. Such was the proof, on the last trial, of that part of the road which lay between Attalla and "Christopher's Cut," near the corporate limits of Gadsden, as they were defined when the survey was made. Of this part only did the appellee have possession, with visible evidences of ownership, and of this part only did the East Alabama & Cincinnati R. Co. acquire possession after the contract of purchase was entered into.

The East Alabama & Cincinnati R. Co. had also a charter of incorporation, under which it was authorized to construct a railroad from Eufaula, through Opelika and Oxford, to Guntersville, on the Tennessee River, the northern terminus of the chartered road of the Tennessee & Coosa Rivers R. Co. Gadsden was in the line of its route; and on this account it desired to make, and did make, the contract of purchase, out of which this litigation grew. The intention was to utilize the survey and grading of the shorter line from Gadsden to Guntersville, in the construction of the defendant's longer line of road. As we have shown, the contract of purchase was entered into July 12, 1871. Before that time, the East Alabama & Cincinnati R. Co. had issued its first-mortgage commercial coupon bonds, to be endorsed by the State under the then existing statutes, to aid in the construction of its railroad. It had also executed its mortgage to trustees to secure the payment of said bonds—the mortgage bearing date July 1, 1870, and conveying and mortgaging, for such purpose, "the franchises, road, road-bed, right of way, and all of the real and personal property now or hereafter belonging to the company." The said East Alabama & Cincinnati R. Co. commenced surveying and locating its line of railroad, from the Coosa River at Gadsden, to Attalla, about May, 1870, and completed the grading from the river to "Christopher's Cut," about October, 1870. It also procured the written conveyance of the right of way from some of the owners, over whose lands the line of the road was selected, in the month of June, 1870, before the said mortgage was executed to secure the bondholders. The entire work of surveying, locating and grading the road from the river to "Christopher's Cut" was done by the East Alabama & Cincinnati R. Co., and was completed before it negotiated the purchase from the Tennessee & Coosa Rivers R. Co. The mortgage executed July 1, 1870, to secure the bonds, evidently embraced and conveyed this section of the railroad line. Meyer *v.* Johnston, 64 Ala. 603. To test this, let us suppose

FURTHER FACTS.

the purchase of one road by the other had never been agreed on, and a question of paramount right had arisen between the bondholders, or the trustees, on the one side, and the Tennessee & Coosa Rivers R. Co. on the other. On the facts stated above, no one could question the superior right of the bondholders secured by the mortgage. And if it be true, as contended for by the appellee (we need not, and do not, admit its correctness), that the appellant railroad company acknowledged appellee's right to the entire line extending to the river, by contracting to purchase it July 12, 1871, this cannot impair nor weaken the already secured rights of the mortgagees, who were not parties to such contract, however much it might conclude the purchasing corporation.

RIGHTS OF MORTGAGE NOT IMPAIRED BY CONTRACT OF PURCHASE.

We have been referred to several authorities, which, it is contended, sustain the argument made by appellee. None of them are opposed to the views above expressed. See Morris & Essex R. Co. *v.* Blair, 1 Stockt. Ch. 635; Mason *v.* B. & N. R. Co., 35 Barb. 373; A. T. & Santa Fe R. Co. *v.* Mecklim, 23 Kans. 167; Van Wyck *v.* Nevals, 106 U. S. 360; Camp *v.* Camp, 13 Amer. Dec. 60, and note.

Special proof that the plaintiff corporation had acquired the right of way over the lands between Attalla and "Christopher's Cut" was wholly unnecessary. The defendant was estopped by its contract of purchase, and possession thereunder, from raising that question. We deem it unnecessary to notice any other exception, or assignment of error, as we believe what is said above will enable the circuit court to rule correctly on another trial.

Reversed and remanded.

COTTING

v.

NEW YORK AND NEW ENGLAND R. Co.

(*Advance Case, Connecticut. July* 20, 1886.)

Defendant being embarrassed by a large floating indebtedness, for the immediate payment of which it had no means, passed into the hands of a receiver, and for the purpose of raising funds to pay said indebtedness was authorized by the legislature to issue not exceeding fifty thousand shares of preferred stock. It issued of said preferred stock nineteen thousand shares, which were sold for cash, and dividends on said stock, to the amount of seven per cent annually, were to be paid thereon from the net earnings of the company and to take priority over dividends on the ordinary stock. A

general statute provided that no corporation should declare any dividend while its capital was impaired.

***Held*, that a dividend on the preferred stock could be made out of the "net earnings" since the issue of said stock, notwithstanding the fact that a large deficiency existed at the time of issuing said preferred stock.**

H. D. Hyde and *A. Brandegee* for plaintiff.
S. E. Baldwin for defendant.

CARPENTER, J.—This case must be determined by its own peculiar circumstances. We find no case so nearly like it that it may fairly be regarded as a precedent.

FACTS. At the beginning of the year 1884, the New York and New England R. Co., with a capital stock amounting to about $20,000,000, par value, and a funded debt of over $16,000,000, secured by mortgages, found itself embarrassed by a floating debt of nearly $2,000,000, for the immediate payment of which it had no means. To avoid suits and attachments, and if possible to prevent a foreclosure of the mortgages, the property and affairs of the company were placed in the hands of a receiver. The receiver had in his possession the franchise and property of the company, subject to the mortgages, which had an earning capacity; and the possibility of the net earnings being more than sufficient to pay the interest on the funded debt, was the only source of means for the payment of the floating debt.

It was believed that the road would be able to earn enough to pay the operating expenses and fixed charges and also to pay the interest on the floating debt. Its present ability to do more was doubtful. In that state of things obviously the payment of the poincipal of the floating debt would have to be indefinitely postponed. It was not reasonable to suppose that the affairs of the company could continue in that condition for any considerable time. It was necessary that some scheme should be devised by which the floating debt could be paid. In this emergency the act of 1884 was passed, which authorized the company, in addition to the then existing authority, to use the proceeds of the sales of the second mortgage bonds previously authorized, but not then issued, "for the purpose of paying any present or future liabilities of said company, or to use said second mortgage bonds as collateral security for money borrowed for that purpose." It also authorizes the company, by consent of a majority in interest of the whole amount of its capital stock, to issue not exceeding fifty thousand shares of preferred stock of the par value of $100 each. The company had its option to resort to either one of the methods authorized; but it was not expected that both would be resorted to, nor was it practicable to do so.

The latter mode was adopted, and preferred stock to the number of nineteen thousand shares was sold for cash, with the avails of

which the floating debt was paid. Dividends on the preferred stock to the amount of seven per cent annually were to be paid from the net earnings of the company; and the time during which the holders were entitled to such dividends commenced to run October 1, 1885. Consequently from that day the net earnings were pledged to the payment of such dividends. The net earnings for the first six months, ending March 31, 1886, were more than sufficient to pay three and a half per cent on the preferred stock. The company is willing to pay this dividend, provided it can be legally paid.

The general statute provides that "no corporation shall declare any dividend while its capital is impaired, and all officers who shall vote in favor of declaring such dividend, in case such dividend is declared, knowing or having the means of knowledge that such capital is impaired, shall be jointly and severally liable in an action on this statute for all losses resulting from said declaration of dividend, and be guilty of a misdemeanor."

The ninth paragraph of the case as stated is as follows: "Said defendant company's general balance sheet on March 31, 1886, showing a balance of $704,095.45, charged to profit and loss account, which represents a deficiency in its earnings, as compared with its operating expenses and fixed charges, during a period prior to October 1, 1885." The question submitted is whether, until that deficiency is made good, any dividend can lawfully be declared and paid to the holders of the preferred stock.

The case further shows that the "sum of $93,413.38 is now on hand in the treasury of the defendant, in cash, and there are no debts or liabilities now due and payable, which the sum is needed to liquidate."

Obviously, if the second mortgage bonds had been resorted to for the purpose of raising the necessary funds, no such question could have arisen. The holders of such bonds, whether holding them in fee or as collaterals, would have been creditors and clearly entitled to interest from the net earnings, regardless of any deficiency in the accounts. While this is by no means conclusive, yet it tends to show that it was the intention of the legislature that the net earnings should be pledged to secure those who might advance money to pay the floating debt. It was immaterial to the State whether the money was raised in the one form or in the other. The important thing to be done in the interest of all concerned was to raise money upon adequate security. We can hardly suppose that the legislature contemplated less security in one form than in the other. There is, therefore, some reason for believing that it was the will of the legislature that the holders of the preferred stock should have the same security that the holders of the second mortgage bonds would have had if such bonds had been issued under the

NET EARNINGS PLEDGED TO SECURE THOSE ADVANCING MONEY.

act; and they certainly would not have been affected by the deficiency in the accounts. Nevertheless, if the holders of the preferred stock hold it as such stock is usually held, with no unusual or extraordinary rights and privileges, they must submit to the legal incidents of such stock; and among those incidents is this, that they are merely stockholders and not creditors; and that no dividends can be lawfully declared and paid to them but from net profits or surplus ordinarily means what is left after making good the capital. It is unnecessary to cite authorities, for on this point we agree with the learned counsel for the common stockholders.

It was doubtless competent for the legislature, in providing for an emergency like this, to authorize the issue of preferred stock upon such terms, within due constitutional limits, as it pleased. The vital question in the case then is, whether the legislature intended the issuing of ordinary preferred stock, or preferred stock the holders of which should be entitled to extra rights and privileges. We are of the opinion that the latter was intended. The act, referring to the stock, says: "The holders of which shall be entitled to receive out of the net earnings of the company dividends of seven per cent per annum, the same to be paid in semi-annual instalments, in such sums as the directors of such corporation may determine; and if the net earnings of any year shall not be sufficient to pay said dividends, the same shall be cumulative and payable out of the net earnings of any subsequent year, but without interest; said dividends and accumulations to take priority over the dividends on all other stock of the company, until, in addition to said dividends on said preferred stock, there shall be paid an equal dividend upon the common stock, after which any dividend declared by said company shall be divided equally between said preferred and common stock."

INTENTION OF LEGISLATURE CONCERNING ISSUE OF PREFERRED STOCK.

Thus the intention is clear that the annual net earnings shall be pledged for the payment of the dividends on the preferred stock for that year and any arrearages for previous years, thus securing to the holders of that stock payment of such dividends in full for every year before any dividends can be paid to the holders of the common stock.

The term "net earnings" may be, and often is, the equivalent of surplus or net profits; but we think it is not used in that sense here. As we have noticed, it is net earnings for a limited time, and not the net earnings for the whole period of time the corporation has existed. The latter may properly be called surplus or profits. To ascertain the surplus on the 31st day of March, 1886, the State of the whole account must be considered, including of course the amount charged to profit and loss prior to October 1, 1885; but to ascertain the net earnings for the six months ending March 31, it is only necessary to

"NET EARNINGS" —INTERPRETATION OF TERM.

deduct from the gross earnings the operating expenses for that time, including repairs and a proportional part of the fixed charges. That in view of the circumstances is a reasonable interpretation; for it must be presumed that the legislature intended measures that should be effectual to give relief to the company. Now if it had been intended that a prior deficiency of nearly three quarters of a million should be considered in determining the net earnings, we think the legislature would have said so in express terms, or in language sufficiently broad and comprehensive to include such a deficiency. Had it done so it is highly probable that the stock would not have been taken, and thus the object of the legislature would have been defeated. As the language of the act will admit of the interpretation we have given it, and will make it more effective than any other construction, it seems to us that it is the more reasonable one.

STATUTE SHOULD BE ENFORCED AS UNDERSTOOD.

Again, the act is an enabling one; it is also special, applying only to this corporation and to those who may contract with it as therein prescribed. Its sole purpose being to authorize the making of certain contracts, it becomes important to inquire how the parties immediately concerned understood and applied it. Manifestly it should be enforced as both contracting parties understood it at the time, if the language used will fairly bear the meaning they gave to it, and especially if the act as thus construed is not contrary to public policy. We see nothing in it which contravenes public policy. True, the policy of the law will not permit corporations, while they continue in business, to distribute their capital among stockholders in the form of dividends; and it is not the privilege of preferred stockholders thus to consume the common stock. We do not intend so to construe this act as to allow that to be done in the case of this corporation. Hence we limit the decision to the deficiency which existed at the time of issuing the preferred stock: should a deficiency hereafter come into existence it will stand upon a very different footing. The present deficiency existed and was known to the legislature when the act passed; the company with knowledge of its own condition entered into this contract; the common stockholders thus virtually said to subscribers to the preferred stock: "The present deficiency in the accounts shall be no obstacle to your dividends." Good faith requires that this understanding should be carried into effect. That we have correctly interpreted this transaction is apparent from the terms of the contract as contained in the certificates of stock. An examination of the certificate will show us clearly how the contracting parties construed the act. The material part is as follows: "These shares of preferred stock are part of an issue not exceeding fifty thousand shares of $100 each, represented by certificates differing only in the year of issue. The holder of this certificate is entitled to seven per cent annual dividend out of the

net earnings of the company from the first day of October in the year above written, payable semi-annually and cumulative, without interest, before a dividend is paid upon the common stock or upon subsequent issues of preferred stock. To entitle the holder thereof to a full annual dividend, this certificate must be surrendered at the time the last instalment of the same is paid, and exchanged for a certificate of the next year's issue."

There are three peculiar features of this certificate. In the first place, it is issued only for one year. Whenever a full dividend for one year is paid, it must be surrendered, cancelled, and a new one issued for the succeeding year. In this respect, and so far as dividends are concerned, it is a mere certificate of indebtedness. The object of this is not very apparent, but was probably designed to promote convenience in keeping the accounts. The stock account will show what dividends are paid in full and what are in arrears. This was considered desirable on account of the second peculiar feature of the certificate, which is, that dividends are cumulative. Ordinary preferred stock payable from the surplus, or net profits, takes its chances with common stock; and if, from any cause, a dividend fails, it is gone. But here the agreed dividend, however long payment may be deferred, keeps its place as a lien upon the net earnings, and must be paid in full before any payment can be made to the holders of the common stock. In this respect the preferred dividends closely resemble the interest on bonds. This evinces an intention that the holders of preferred stock shall have special advantages. In form stock is sold and issued, and the purchasers become stockholders, but in substance, as to dividends, they have the advantages of creditors. Then, in the third place, the dividends are to be paid from the net earnings from a given time, October 1, 1885. At that time this deficiency existed, but as it did not represent a debt calling for immediate payment, the legislature said to the company: "You may raise money in either one of the two ways indicated, by pledging your net annual earnings as security; and whichever way you may adopt, the apparent deficiency shall not affect the security."

The company accepted the proposition and embodied it in the certificates of stock. We cannot doubt that the parties to the contract so understood it. Clearly it should be enforced as the parties intended it. Otherwise we shall substitute for the contract which the parties did make, one which they did not make. In that event one party will surely be defrauded. The superior court is advised that the company may lawfully declare and pay the proposed dividend.

In this opinion the other judges concurred.

MUNSON *et al.*

v.

SYRACUSE, GENEVA AND CORNING R. Co. *et al.*

(*Advance Case, New York. October* 5, 1886.)

A contract entered into between several individuals on one part, and a railroad corporation on the other, where one of the parties of the first part, at the time the contract was made, was a director of the corporation, and took part in making the same, is voidable, at the option of the railroad corporation.

A contract entered into by the promoter of a corporation does not bind the corporation.

A contract by which the bondholders of an insolvent railroad company agreed to foreclose a mortgage on its property, to buy the property at the mortgage sale, and to transfer it to another company of which one of the bondholders of the insolvent road was a director, in consideration of the transfer of certain bonds of the proposed new company, *held* not to be such a contract as is sanctioned by chapter 710, Laws N. Y. 1873, relating to the reorganization of an existing railroad.

APPEAL by plaintiffs from a judgment upon a decision of the general term of the fifth department of the supreme court, affirming a judgment entered upon the report of a referee in favor of defendant. The action was to enforce specific performance of a contract to deliver certain bonds of the Syracuse, Geneva & Corning R. Co. The issues were referred to J. L. Angle, of Rochester, who reported in favor of plaintiff, August 20, 1880, and judgment was entered directing specific performance of the contract, from which judgment defendants appealed to the general term, fourth department, on which appeal said judgment was reversed, on the ground that the contract sought to be enforced was against public policy. The case was again tried before A. J. Northrup, as referee, who reported in favor of defendants, upon which report judgment was entered dismissing the complaint, from which judgment plaintiffs appealed to the general term, when the last-named judgment was affirmed. Plaintiff thereupon appealed to the court of appeals.

Samuel Hand and *B. W. Huntington* for appellants.

George F. Comstock for respondents.

ANDREWS, J.—We think it would be difficult to affirm the judgment of the court below dismissing the complaint, if, in order to do so, it was necessary to uphold the proposition that the original contract of August 13, 1875, between the plaintiffs and Magee, was invalid either because Munson, one of the plaintiffs, was, at the time of entering into the contract, a director of the Sodus Bay &

Corning R. Co., or for the reason that the contract violated the rule which prohibits combinations to prevent competition at a judicial or other public sale. The situation was briefly this:

The Sodus Bay & Corning R. Co. was organized in 1871 to construct and operate a railroad from Corning, in the county of Steuben, to Sodus Bay, in the county of Wayne, a distance of about 86 miles, passing through the counties of Schuyler, Yates, and Ontario, by way of Savona, Penn Yann, and Geneva. Of this road the plaintiff Munson was president and a director. In 1872 the corporation created a mortgage on its projected road, its franchises and property, for $1,500,000, to secure a contemplated issue of bonds to that amount, to be used in the construction of the road. It proceeded to secure rights of way over a portion of its line, graded about 30 miles of its track, between Savona and Geneva, and expended in the aggregate, in securing titles and in the prosecution of the work, the sum of $250,000. It issued bonds under the mortgage to the amount of $257,000, from the proceeds of which the expenditures were made. At the date of the contract between the plaintiffs and Magee, August 13, 1875, the plaintiffs held and controlled, of the bonds, $241,000 in amount; the remaining $16.000 being in the hands of a former treasurer of the company, whose title thereto seems to have been disputed, but who subsequently received a dividend thereon from the proceeds of themortgage sale. The title of the plaintiffs to the $241,000, of bon ds was not questioned, and there is no suggestion that they were not *bona fide* holders for value, or that the bonds did not represent a valid debt against the company for their full amount. Facts.

In January, 1874, the company became insolvent. It defaulted in the payment of the interest on its bonds at that date, and in the spring of 1875 all operations on the road were suspended, and the further prosecution of the enterprise was practically abandoned. In short, when the contract of August 13, 1875, was made, the company was hopelessly bankrupt, the work had stopped, the interest on its bonds had been unpaid for 18 months, and practically its whole property consisted of disconnected rights of way over a portion of its route, and a road-bed partially graded between Savona and Geneva; and whatever property it had of any value was acquired through the means furnished by the holders of the bonds.

Under these circumstances the parties entered into the contract of August 13, 1875. It recites that the plaintiffs own and represent $241,000 of the bonds of the Sodus Bay & Corning R. Co., and that Magee, the other party to the contract, represents the persons and interests proposing to organize another railroad company for the construction of a railroad from the vicinity of Corning to Geneva. The parties of the first part (the plaintiffs) agree to proceed at once to secure the foreclosure of the mortgage, and purchase, on the foreclosure sale, the property, rights of way

franchises, and interests covered thereby, and convey the same to Magee, or to the railroad company proposed to be organized. Magee, the other party to the contract, agrees to deliver, or cause to be delivered, to Munson and his associates, in payment for the said property, rights of way and franchises, first-mortgage bonds of the proposed railway company to the amount of 50 per cent of the principal and interest of the bonds of the Sodus Bay & Corning R. Co. held by them. The contract contains other stipulations not now necessary to mention.

In the view we take of another question in the case, we deem it unnecessary to determine whether the contract of August 13, 1875, was valid as between the original parties thereto; that is, whether the plaintiff Munson, in entering into the contract, violated any duty owing by him to the corporation of which he was a director, or whether the contract as a whole was, on the part of Munson and his associates, anything more than a legitimate arrangement to protect their interests as bondholders, and to make the mortgage security available for the payment of a part of the mortgage debt. The contract was not by or with the Sodus Bay & Corning R. Co.; and, assuming that the question as to the validity of the original contract can be raised in this action, we are not prepared, without further consideration, to condemn the transaction on either of the grounds suggested. Duncomb *v.* New York, H. & W. R. Co., 84 N. Y. 190; Marie *v.* Garrison, 83 N. Y. 14; Harpending *v.* Munson, 91 N. Y. 650. But this action is not brought to enforce the contract of August 13, 1875, against the defendant Magee. It is an action to compel the specific performance, by the defendant corporation, of the undertaking of Magee in that contract to deliver the bonds of the new company as therein provided, founded upon the assumption by the new company of that obligation, by resolution of its board of directors passed August 13, 1875, and also upon the subsequent contract of September 14, 1875, made between the company and the plaintiffs, which in its primary provision substituted the company in the place of Magee as the party of the second part in the contract of August 13, 1875.

VALIDITY OF ORIGINAL CONTRACT NOT DETERMINED.

NATURE OF THE ACTION.

The action in its entire scope is framed to enforce the obligation of the defendant corporation under its contract of assumption. It was tried upon this theory. The exceptions point to this as the ground of the action, and Magee is joined as defendant, and in the demand of relief, as the custodian of bonds of the company which the plaintiffs claimed he should be adjudged to deliver to them by the judgment in the action. Throughout the trial the action was treated as an action against the defendant corporation upon its contract, and in no respect as an action against Magee to enforce a liability against him under the contract of August 13, 1875. The plaintiffs, therefore, are compelled to meet the question whether,

upon principles of equity, they are entitled to the aid of the court to enforce an executory contract between themselves on the one side, and the defendant corporation on the other, for the sale of the property of the former, in a case where one of the plaintiffs, at the time the contract was made, was a director of the purchasing corporation, and took part in making the contract upon which the action is brought.

ADDITIONAL FACTS.

For proper understanding of the situation a few additional facts need to be stated. On the 26th of August, 1875, Magee and his associates organized a railroad company to construct a railroad from Corning to Geneva, as contemplated by the contract of August 13, 1875. The plaintiff Munson was one of the promoters, and became a director and stockholder, and was the first president of the corporation. On the 31st of August, 1875, Magee executed a written assignment to the new corporation, the Syracuse, Geneva & Corning R. Co., of his rights under the contract with the plaintiffs of August 13, 1875; and the board of directors, at a meeting on the same day, in which the plaintiff Munson participated, passed a resolution assuming the contract on the part of Magee, and agreeing to perform it, except in one particular not now material to be mentioned. On the 14th of September, 1875, the contract before referred to of that date was entered into between the plaintiffs and the new corporation, and was executed individually by each of the plaintiffs, and on the part of the corporation by the plaintiff Munson as president. The proceedings of the board of directors indicate that when the resolution of August 13, 1875, was passed, and for two or three months thereafter, the company contemplated building its road to Geneva on the same line substantially as that of the Sodus Bay & Corning R. Co., but in December, 1875, it located an entirely new line, not coincident in any part with the line originally contemplated, upon which new line its road was subsequently built. It is found, and the evidence supports the finding, that the best interests of the company were promoted by adopting its present route. The plaintiffs procured a foreclosure of the mortgage, and purchased the property, as they had agreed, and subsequently, in 1877, tendered a deed thereof to the defendant corporation, and demanded the delivery of the bonds, which was refused.

CONTRACT OF AUGUST, 1875, CONSIDERED.

In determining the legal question presented, it is proper to say that there is no evidence of any actual fraud or collusion on the part of any of the parties to the original contract of August 13, 1875, or that the contract of assumption was induced by any improper appliances or motives whatever. It is plain that Magee and his associates, when they entered into the original contract, contemplated building the proposed road on the line of the Sodus Bay & Corning R. Co., and that the contract was made with a view of acquiring for the new road the rights of way

and other property of that corporation. It is equally plain that the contract of assumption was entered into by the new corporation with the same expectation, and for the same purpose.

If the contract was otherwise unobjectionable, it could not, we think, be assailed on the ground that it was a contract outside of the power of the defendant corporation. The statute authorizes a railroad corporation to acquire land for its track and other necessary purposes, by voluntary purchase or by condemnation (Laws 1850, c. 140, §§ 14, 15); and an agreement, made on the purchase of rights of way, to pay therefor in bonds of the purchasing corporation, secured by a mortgage on its property, is clearly, we think, within the implied, if not within the express, powers of a railroad corporation. Section 28, sub. 10. The contract made between the defendant corporation and the plaintiffs was in substance a contract to purchase rights of way; and although the defendant's line was not formally located on the line proposed to be purchased, and was in fact subsequently located on a different line, this change of purpose does not, we think, affect the question of corporate power.

SAME—NOT TO BE ASSAILED AS ULTRA VIRES.

But we are of opinion that the contract of September 14, 1875, is repugnant to the great rule of law which invalidates all contracts made by a trustee or fiduciary, in which he is personally interested, at the election of the party he represents. There is no controversy as to the facts bringing the case as to Munson within the operation of the rule. He and his associates were dealing with a corporation in which Munson was a director, in a matter where the interests of the contracting parties were or might be in conflict. The contract bound the corporation to purchase, and Munson, as one of the directors, participated in the action of the corporation in assuming the obligation, and in binding itself to pay the price primarily agreed upon between the plaintiffs and Magee. He stood in the attitude of selling as owner, and purchasing as trustee. The law permits no one to act in such inconsistent relations. It does not stop to inquire whether the contract or transaction was fair or unfair. It stops the inquiry when the relation is disclosed, and sets aside the transaction, or refuses to enforce it, at the instance of the party whom the fiduciary undertook to represent, without undertaking to deal with the question of abstract justice in the particular case. It prevents frauds by making them, as far as may be, impossible, knowing that real motives often elude the most searching inquiry; and it leaves neither to judge nor jury the right to determine, upon a consideration of its advantages or disadvantages, whether a contract made under such circumstances shall stand or fall.

CONTRACT OF DIRECTOR WITH CORPORATION INVALID.

It can make no difference in the application of the rule in this case that Munson's associates were not themselves disabled from

contracting with the corporation, or that Munson was only one of ten directors who voted in favor of the contract. The contract on its face notified Munson's associates of his relation to the corporation, and that the contract was subject to be defeated on that ground; and, on the other hand, a corporation, in order to defeat a contract entered into by directors, in which one or more of them had a private interest, is not bound to show that the influence of the director or directors having the private interest determined the action of the board. The law cannot accurately measure the influence of a trustee with his associates, nor will it enter into the inquiry, in an action by the trustee in his private capacity to enforce the contract, in the making of which he participated. The value of the rule of equity to which we have adverted lies, to a great extent, in its stubbornness and inflexibility. Its rigidity gives it one of its chief uses as a preventive or discouraging influence, because it weakens the temptation to dishonesty or unfair dealing on the part of the trustees, vitiating, without attempt at discrimination, all transactions in which they assume the dual characters of principal and representative.

NO DIFFERENCE THAT MUNSON'S ASSOCIATES WERE NOT DISABLED.

The rule has been declared and enforced in a great variety of cases; but in none, perhaps, with more vigor and completeness, both upon principle and authority, than in the leading case of Davoue *v.* Fanning, 2 Johns. Ch. 252. But the case of Aberdeen R. Co. *v.* Blakie, 1 Macq. 461, decided by the house of lords, is in many of its features similar to the present one. In that case it appeared that the plaintiffs were a manufacturing firm, and that one of them was also a manager of the Aberdeen R. Co., the defendant, and the chairman of the board. At a meeting of the managers, they by resolution authorized their engineer to contract for iron chairs needed for the company. The agent contracted with the plaintiff's firm. It did not appear that the member of the firm, who was also a manager and the chairman of the company, intermeddled with the dealing on either side, further than that it may be assumed he was at the meeting which authorized the engineer to procure a supply of chairs. The plaintiffs brought their suit to enforce specifically the performance of the contract, or, in the alternative, to recover damages for its nonperformance. After a decision in their favor in the lower court, the company appealed to the house of lords, where the ruling was unanimously reversed, on the ground that the contract was condemned by the rules of equity as having been made between the company of which one of the plaintiffs was a manager, and a private firm of which he was a member. The opinions of Lord Chancellor Cranworth, and of Lord Brougham, vindicate, upon impregnable grounds, the general rule and its application to the particular case.

AUTHORITIES.

We have designedly omitted, up to this time, special reference to a circumstance which it is claimed takes the case out of the operation of the general equitable rule; that is, that the contract with the defendant corporation was not, on the part of the plaintiffs, a fresh dealing in respect to the sale of their interest in the property of the Sodus Bay & Corning R. Co., but was simply a substitution, in the place of Magee, of the corporation organized by him and his associates for the purpose of carrying out the original arrangement. But the promoters of the corporation are not the corporation. The legal body is distinct from the individuals who compose it. The statute confers no authority upon the promoters of a corporation to enter into preliminary contracts binding the corporation when it shall come into existence. Such contracts may bind the individuals who make them. If adopted by the corporation, and they are within the corporate powers, and are not otherwise subject to objection, they may become the contract of the corporation, and enforceable as such.

CONTRACTS OF PROMOTERS NOT BINDING ON CORPORATION.

In respect to contracts of promoters, Judge Redfield says: "The promoters are in no sense identical with the corporation, nor do they represent it in any relation of agency; and their contracts could, of course, only bind the company so far as they should be subsequently adopted by it as their successors." 1 Redf. Rys. 9.

But the corporation is at liberty to refuse to sanction them; and if its sanction is obtained by the act or co-operation of directors who have a private interest, we perceive no reason why, under the general rule, the corporation may not resist an action for specific performance; at least, in a case where it has not accepted the consideration and taken the benefit.

It is claimed that the general policy of the law in this State sanctions the contract in question, and we are referred to chapter 710, Laws 1873, which authorizes the purchaser, or the grantee of the purchaser, of the real estate, tracks, and fixtures of a railroad corporation solely under a mortgage or decree, to associate with him other persons, and form a new corporation to maintain and operate the road. But the transaction in question was not in any proper sense an arrangement for the reorganization of an existing railroad. It was contemplated that the new corporation should operate or maintain the road of the old corporation. The line of the new corporation, by its articles, extended only from Corning to Geneva; whereas the route of the old corporation was from Corning to Sodus Bay. When the contract was made, the enterprise of building the Sodus Bay & Corning road had been commenced, but the road had not been built. Its route had only in part been located, and the great burden and expense of the undertaking was

yet to be incurred. The case is not in terms within the Act of 1873; nor, as we think, within its spirit and intent.

These views lead to an affirmance of the judgment.

(All concur, except RAPALLO and FINCH, J.J., not voting.)

BARRY

v.

MISSOURI, KANSAS AND TEXAS R. Co. *et al.*

(*Advance Case, U. S. Circuit Court, S. D. New York. March* 22, 1886.)

A., the owner of certain coupons and scrip certificates of unpaid interest owing by a foreign railroad corporation upon bonds secured by an income mortgage, in behalf of himself and other owners of coupons and certificates, filed a bill in the circuit court against the railroad company and the Union Trust Co. a citizen of the same State as himself, which was the trustee named in the income mortgage, to compel an accounting, and for an injunction against the appropriation of the earnings of the railroad company contrary to the rights of the income bondholders, and for a decree for the payment of the income applicable to the interest, averring that the trust company was made defendant because it asserted that no duty was imposed on it in respect to the matters involved in the suit, and had refused to bring suit when requested so to do. *Held*, that the circuit court had jurisdiction.

As a general proposition, the "net earnings" of a railroad company are the excess of the gross earnings over the expenditures defrayed in producing them, aside from, and exclusive of, the expenditure of capital laid out in constructing and equipping the works themselves.

The expenses defrayed or incurred in producing the earnings for a given interest period are the only charges which can enter into the income account for that period, except the payment of interest on prior incumbrances, as stipulated by the terms of the mortgage; and the company cannot charge against income, for any period during the life of the mortgage, a payment or a liability incurred on account of old indebtedness existing before the mortgage was created, or arising from a loss incurred by the sale of bonds issued to pay off old indebtedness.

Where a mortgage is executed by a railway company to a trustee, conditioned for the payment of interest upon the bonds secured by the mortgage at semi-annual periods out of the surplus earnings of the company, the mortgagor owes a duty to the bondholder to keep such an account of its earnings and expenses as will show the net results of each interest period, and the trustee owes an active duty to the bondholders in the supervision of the account.

Where the bonds are coupon bonds, and such an account has not been kept for a series of years, upon an accounting the holders of coupons are entitled to have the interest earned during each interest period applied upon the coupons representing that period.

Mortgage and bonds construed, and manner of accounting directed.

In equity.
Anderson & Man for complainant.
Dillon & Swayne for defendant.

WALLACE, J.—The complainant is the owner of coupons and scrip certificates representing $43,462 of unpaid interest owing by the defendant the Missouri, Kansas & Texas R. Co. upon bonds secured by an income mortgage created by it April 1, 1876. He has filed this bill on behalf of himself, and all other owners of coupons and certificates who may desire to join, to compel an accounting by the railway company of its earnings and operating expenses since the making of the mortgage. The bill prays for an injunction against the appropriation of the earnings contrary to the rights of the income bondholders, and for a decree for the payment of the income applicable to the interest. The defendant the Union Trust Co. of New York is the trustee named in the income mortgage, and the bill avers that this corporation is made a defendant because it asserts that no duty is imposed on it in respect to the matters involved in the suit, and has refused to bring suit after request on behalf of the complainant and others similarly situated. No relief is sought against the trustee, and it has not answered or appeared in the suit. FACTS.

The question is presented preliminarily to a consideration of the case upon its merits whether this court has jurisdiction, the complainant and the defendant the Union Trust Co. (a New York corporation) both being citizens of this State. The Union Trust Co. is a necessary party to the suit, and this has been so determined by this court when the case was before it on a former occasion upon a demurrer to the bill of complaint and the Union Trust Co. No relief is sought against this defendant by the complainant. Its interests and those of the complainant are not adverse, but are identical. In Pacific Railroad *v.* Ketchum, 101 U. S. 289, 298, the court held that the trustees of a mortgage which was being foreclosed at the suit of bondholders might properly be arranged on the same side of the controversy about the foreclosure with the complainants, although they were nominal defendants, because there was no antagonism between them and the complainants, and no relief was asked against them. To the same effect is the case of Arapahoe Co. *v.* Kansas Pac. R. Co., 4 Dill. 277. These authorities are decisive of the jurisdictional question. JURISDICTION OF U. S. COURT.

Upon the merits, the questions in the case are—(1) whether the mortgagor has failed to apply net or surplus earnings to the payment of interest upon the bonds; (2) whether the holders of scrip certificates stand in the place of holders of coupons, and are entitled to payment from the surplus earnings; (3) whether the earnings are applicable *pro rata* upon all the coupons unpaid, or only to such

as fall due during the period in which earnings were realized that should have been applied to the payment of interest.

The income mortgage was created to secure a series of bonds for the sum of $1000 each, amounting in the aggregate to $10,000,000. Each bond recites that the railway company "is indebted to the Union Trust Company of New York, or bearer, in the sum of one thousand dollars, which the said railway company promises to pay to bearer on the first day of April, 1911, in the city of New York; and from the net or surplus earnings of said railway company to pay, according to the terms of the trust deed or mortgage hereinafter mentioned, interest thereon semi-annually, at the rate of 6 per cent per annum, at its office in the city of New York, on the first days of April and October in each year, upon the presentation and surrender of the coupons hereto attached as they severally become due; and in case of default in the payment of any of the interest coupons attached to this bond in the manner provided in the said trust deed or mortgage, then, and in that case, the principal sum of this bond shall become due in the manner and with the effect provided in the said trust deed or mortgage." The bond then recites that "the whole series of bonds are secured by a trust deed or mortgage conveying in trust the corporate property, real and personal, land grants, and the franchises and privileges belonging to, or hereinafter to be acquired by, the railway company;" and continues as follows: "The entire income of said property, after the payment of the expenses of operating and keeping the said railway and property in repair, and of the interest on the incumbrances prior hereto, which are more fully set forth in said trust deed or mortgage, is pledged to the payment of these bonds, and the interest thereon, in the manner set forth in said trust deed or mortgage."

RECITALS IN BONDS AND MORTGAGES.

The mortgage, the terms of which are thus by reference incorporated into the bonds, enumerates in article second the prior incumbrances upon which interest is to be paid before income applicable to the payment of interest on the bonds is to arise. They amount in the aggregate to $19,080,000.

The third article of the mortgage recites the promise to pay as recited in the bonds, with the following additional clause:

"And in case at any time the said net or surplus earnings so remaining as aforesaid shall not be sufficient to pay the interest on said bonds as the same becomes due and payable, the said party of the first part [the railway company] shall issue to the holder of the coupons or interest warrants of said bonds a scrip certificate, payable only from the net or surplus earnings of said party of the first part, and which, with interest thereon at the rate of six per cent per annum, shall be redeemed and paid by the said party of the first part before it shall declare or pay any dividend upon its capital stock."

The sixth article of the mortgage recites the promise to pay interest in somewhat different terms from the language of the bond and of the third article of the mortgage, and reads as follows:

"The said party of the first part hereby further agrees that it will pay, or cause to be paid, the said bonds issued and secured by this mortgage, and that it will pay the interest thereon semi-annually, in lawful money, from its net or surplus earnings: . . . provided, said net or surplus earnings shall be sufficient therefor; and that in case its said earnings in any six months shall be insufficient therefor, then for any such deficit said party of the first part agrees to issue a scrip certificate, redeemable, with six per cent interest, before any dividend shall be declared upon the stock of said company."

The seventh article of the mortgage authorizes the trustee, in case of the neglect of the mortgagor to pay any interest due upon the bonds, and after such neglect shall continue for one year after the interest has been demanded, to enter upon the property, and hold, use, and operate the same until a sale thereof pursuant to the power of sale contained in the mortgage, and to apply the moneys accruing, after deducting the expenses of operating and managing the property, to the payment of the bonds *pro rata*.

The eighth article of the mortgage contains the usual power of sale of the property and franchises, in case of a neglect on the part of the mortgagor to pay the interest upon the bonds, and provides that in case of sale the proceeds shall be applied to the payment of the principal and interest of the bonds unpaid *pro rata*.

It appears by the proofs in respect to the surplus earnings of the company that during the period beginning April 1, 1876, and ending January 1, 1885, there was charged by the company against earnings in its net income account, among others, certain disputable items, amounting in the aggregate to $3,784,336. If these items are not properly chargeable against the income, the result would be that surplus earnings arose during that period of time to the amount of $2,073,662, being net profits from the business of the company applicable to the payment of the interest upon the bonds beyond the payment of interest on prior incumbrances and the expenses of maintaining and operating the property. Of these items, one of $255.275 is for unpaid indebtedness which had accrued against the company before the income mortgage was created; another of $1,593,665 is for the difference between the face of the income bonds and the sum realized upon them (80 cents on the dollar) by the company; another of $1,398,935 is for interest on prior incumbrances which the company has not paid, and which the complainant alleges the company is under no obligation to pay; and the other items are likewise for interest for which the complainant alleges the company was not liable.

ITEMS CHARGED AGAINST INCOME ACCOUNT.

Respecting the disputed items for interest, it appears by an agreement forming part of the income mortgage that this mortgage was created in order to fund unpaid interest upon existing mortgages of the company, and to pay off certain other mortgage bonds and the creditors at large of the company. The holders of the first mortgage bonds, the holders of junior mortgage bonds, and the creditors at large, together with the railway company, were parties to the agreement. By the terms of the agreement the holders of the first mortgage bonds were to accept the income bonds which were to be created at 80 cents of their face value, in payment of their unpaid interest; and agreed to reduce their interest for the ensuing six years to 4 per cent per annum for the first three years, and to 5 per cent for the last three years, and to accept the income bonds in payment of the difference between the original and reduced rate or interest. The agreement also provided that if at any time the surplus earnings of the railway company should be more than sufficient to pay the interest on the first mortgage bonds at the reduced rate for the six years, and in addition thereto the interest upon the income bonds, the excess of the net earnings should be applied to increase the payment of interest on the first mortgage bonds up to the full amount originally payable thereon.

Unquestionably the bondholders are entitled to an account of the earnings, and the sums charged against the earnings, for each six months from the date of the mortgage, if the proofs justify the conclusion that surplus income has been earned after deducting all payments or liabilities which were legitimately charged against the income during the period of the earnings. The inquiry is whether there is any remainder of the earnings after the payment of operating expenses, repairs, prior interest, taxes, etc. It is not essential that the company shall have actually paid the disbursements which arise from these sources during the period of the earnings; it suffices if the company has become liable to pay them, although the time of payment may have been deferred. The expenses and liabilities incurred for the maintenance and operation of the road, and for interest on prior liens during each interest period, are to be charged against the income for that period. The term "net earnings" is defined in the opinion of the court in the case of Union Pac. R. Co. *v.* U. S., 99 U. S. 420, as follows: "As a general proposition, net earnings are the excess of the gross earnings over the expenditures defrayed in producing them, aside from, and exclusive of, the expenditure of capital laid out in constructing and equipping the works themselves." The expenses defrayed or incurred in producing the earnings for a given interest period are the only charges which can enter into the income account for that period, except the payment of interest on prior incumbrances, as stipulated by the terms of the mortgage. Applying this rule, it is preposterous to

WHETHER ANY REMAINDER OF EARNINGS— MEANING OF NET EARNINGS.

assert that the company could properly charge against income for any period during the life of the mortgage a payment or a liability incurred on account of old indebtedness exisitng before the mortgage was created, or arising from a loss incurred by the sale of bonds issued to pay off old indebtedness. It might, with equal propriety, seek to offset its whole funded debt against its income.

It is difficult to understand upon what theory the company assumes the right to charge against income items for interest, some of which has not been paid, and all of which has been discharged to the company by the agreement of the holders of incumbrances. The company has assumed to charge against the income account the difference between the rate of interest which the first mortgage bondholders agreed to accept for six years and the original rate to which they would have been entitled if the agreement had not been made. The terms of the agreement are so plain that it does not seem possible to misconceive its effect, which was, as was intended, to substitute a reduced rate for the original rate for six years, unless a surplus should arise after the payment of the interest on the income bonds. When the holders of the first mortgage bonds received the income bonds the agreement was fully executed. In the face of this agreement the company undertakes to charge against income not only the difference between the original and the reduced rate which it has paid to the bondholders for the last two of the six years, but also the difference for the first four years, which has not been paid, but has been funded, and is now represented by the income bonds.

RIGHT TO CHARGE ITEMS FOR INTEREST AGAINST INCOME.

It has been suggested for the company in the argument of its counsel, that sanction is found for the position of the company in an adjudication in the suit between the company and the Union Trust Company, in the circuit court of the United States for the district of Kansas; but it is not apparent from the record in that case that any such question as is now presented was directly or indirectly in issue, or was considered by the court.

It is also insisted for the railway company that it can properly charge against earnings the sums required to be set apart annually for a sinking fund under the provisions of the first mortgage; that the company is in arrears nearly $2,500,000 in its appropriation for this sinking fund; and that, deducting this amount from its gross earnings, there is no net income applicable to interest on the bonds. This mortgage has not been put in evidence, but, assuming its provisions to be as stated in the brief of counsel, the sufficient answer to the contention is that the obligation of the company to the income bondholders is in explicit terms to appropriate all its earnings to the payment of interest upon the income bonds except such as are to be devoted to the expenses of operating and keeping in repair its railway and mortgaged property, and to the payment of the in-

RIGHT TO CHARGE SUMS TO BE SET APART FOR SINKING FUND UNDER OLD MORTGAGE.

terest on the prior incumbrances. Disallowing the items which have thus been improperly charged against the income account, there is apparently a considerable sum arising from net earnings which should be applied to the payment of the interest on the income bonds.

It remains to consider the principles upon which the accounting should proceed, and this involves an interpretation of the income mortgage in order to ascertain what is the obligation of the railway company to the bondholders respecting the payment of interest, and what are the rights of holders of coupons and of the scrip certificates.

INTERPRETATION OF INCOME MORTGAGE—OBLIGATION OF COMPANY—RIGHTS OF HOLDERS OF COUPONS AND SCRIP CERTIFICATES.

The mortgage creates a pledge during the 35 years between its date and the time of its maturity of the bonds of so much of the net earnings of the railway company —that is, the income after paying the expenses of operation and maintenance, and interest on the prior incumbrances—as may be necessary to pay the interest upon the income bonds. This interest is to be paid at specified semi-annual periods. The promise of the bond is to pay the principal at maturity, and to pay the interest semi-annually, at the rate of 6 per centum, "from the net or surplus earnings;" but in article 6 of the mortgage this promise is further qualified so as to expressly restrict the obligation of the company to pay interest, "provided said net or surplus earnings shall be sufficient therefor." Consequently, unless within some one of the six-months periods between the date and the maturity of the bonds net income is realized, the company is not in default, and is under no present obligation to pay interest. By the third article of the mortgage it is provided that in case, at any time, the surplus earnings shall not be sufficient to pay the interest as it matures, the company shall issue to the holders of interest coupons "a scrip certificate, payable only from the net or surplus earnings of the company," carrying interest at the rate of 6 per cent, which be redeemed and paid by the company before it shall declare any dividend to its stockholders. This provision, as well as the language of the bond itself reciting a pledge of the entire income of the property to the payment of the interest on the bond, clearly indicates that although the payment of all interest not earned within any of the interest periods is to be postponed until a future day, nevertheless it is to be paid whenever there is net income applicable thereto. It is not only to be paid when there is a fund applicable to its payment, but it must be paid before any dividend can be declared by the company to the stockholders. The declaration of a dividend would conclude the company from controverting the existence of the fund. Under the terms of the eighth article of the mortgage the certificates, which represent interest payable but not earned, stand upon the same footing as the principal of the bond, and are to be paid out of the proceeds of the

sale of the property, or, if the proceeds are not sufficient for the payment in full, are to be paid *pro rata*.

According to the scheme of the mortgage, as denoted by the several provisions referred to, the surplus earnings of each interest period belong to the holders of coupons for that period. If the earnings are insufficient to pay the interest in full, the holders are entitled to scrip certificates for the residue; if the net earnings more than suffice to pay the interest for the six months, the surplus falls into a general fund for the payment of holders of scrip certificates ratably; if there are no net earnings until an exercise of the power of sale under the eighth article, the unearned interest becomes principal, and is to be paid as principal out of the proceeds of the sale. The coupon-holders have the first lien upon the surplus earnings for the period represented by their coupons, but as to earnings from any other period they have only the rights of certificate-holders; and whether they surrender their coupons or not, if the earnings are insufficient to pay the interest in full they stand as certificate-holders for their interest unearned. It has been suggested that the surrender of a coupon, and the acceptance of a scrip certificate in lieu, is a release of any claim by the coupon-holder upon the surplus earnings of the interest period represented by the coupon. But, as has been stated, the obligations of the company towards the coupon-holder, and his lien upon the surplus earnings, are the same whether he surrenders his coupon or does not. If he does not surrender it, the unearned interest which it represents is solvable by a certificate, and his lien upon the income is restricted to such as arises during the interest period of his coupon. If he does surrender it, there is no new consideration to support a release of interest which belongs to him, or of his lien upon the income for it. If he accepts a certificate for his coupon, he does so upon the representation of the company that there are no net earnings applicable to the present payment of his interest. If this representation is a falsehood, the coupon-holder cannot be prejudiced by it. Every certificate, according to the true construction of the mortgage, represents the unearned interest of the period of a particular coupon or set of coupons; and the coupon-holder and the certificate-holder stand in the same category of creditors, and are entitled to be paid *pro rata* out of the earnings of the interest period represented by their coupons or scrip.

By reason of the obligation of the company, as expressed in the bond and mortgage, to devote the net income semi-annually to the payment of interest, a duty arises by implication, and rests upon the company, to keep such an account of its earnings and expenditures as will show the net income of each semi-annual interest period applicable to the payment of the interest. The company has not attempted to fulfil this duty, and the trustee for the income bondholders has apparently

PROPER ACCOUNT TO BE KEPT—INCOME PERIODS.

supinely relinquished to the officers of the railway company the supervision of the accounts which the trustee should have exercised itself. The railway company now produces an account of its income and expenditures, not divided into income periods, but covering a series of years in which there are charges against earnings so palpably unwarranted as to suggest the inference that its officers have strained their ingenuity to conceal a fund which it was their duty to pay over to the bondholders of the bonds. If upon such an accounting as the railway company will be directed to make it should appear that so large a sum has been withheld as there is now reason to suppose, it may become the duty of the court to appoint a receiver to protect the interests of the bondholders which seem to have been so inadequately protected by the trustee. It is not necessary, however, to decree at present any further relief than such an accounting as will afford the proper basis of a final decree appropriating any sum found due according to the rights of the holders of coupons and certificates.

A decree is ordered directing an accounting by the railway company before a master respecting its earnings and income for six months from the date of the mortgage, and its expenses during the same period for operating and keeping in repair its railway and property, as well as of the sums paid, or which it is liable to pay, for the interest upon the incumbrances prior to the income mortgage specified in the instrument, and for taxes and assessments. Upon such accounting the railway company is to be disallowed any sums paid or charged on account of debts which it had contracted prior to the creation of the income mortgage; is to be disallowed any charge against income arising from the sale of its income bonds at a price less than their face amount; and is to be disallowed any interest upon the first mortgage bonds which it has not actually paid, or become liable to pay, and all which has been funded and is now represented by the income bonds accepted by holders of the first mortgage bonds in lieu of interest. The master will ascertain how much net or sulplus earnings have been made by the company during each six-months period, to the time of the filing of the bill. The master will also ascertain the amount of coupons converted into scrip certificates, and the interest periods represented by the certificates, respectively, to the end that it may be finally decreed that the net income of each interest period shall be paid ratably to the holders of coupons or certificates representing interest for the same six months.

DECREE.

Construction of Agreement made to Prevent Necessity of Foreclosure.— The Missouri, Kansas & Texas R. Co., being embarrassed, made on the first of March, 1876, a contract with its bondholders, whereby the Union Trust Co., as mortgage trustee, was let into the possession and operation of the road, under the further agreement that the first mortgage bondholders would accept 4 per cent interest instead of 7 per cent for the years 1876, 1877, 1878, and 5 per cent interest instead of 7 for the years 1879, 1880, and 1881. In

the event of earnings over the amount necessary to pay this *reduced* rate of interest, the agreement provided that such excess should be used in the payment of interest on the second mortgage income bonds. At the end of four years the company tendered the full amount of all interest on the first mortgage bonds then in arrears, and demanded the possession of the road. *Held*, construing the agreement of March 1, 1876, that that agreement was made for the benefit and protection of the railway company, to prevent the necessity of a foreclosure, and that the railway company, on the payment of all interest in arrears, at the full rate, was entitled to the possession of its property, although the six years contemplated by the March agreement had not elapsed; and that the income bondholders had no right to insist on the property remaining for two years more in the hands of the trust company. Union Trust Co. *v.* Missouri, etc., R. Co., 26 Fed. Rep. 485.

Freehold and New York R. Co.

v.

Hodgson.

(39 *New Jersey Equity Reports*, 518.)

The holder of a decree against an insolvent railway corporation who, as director of a new corporation, with full knowledge, consents to the subsequent acceptance of a deed from a receiver to it, free from all encumbrances, under the statute, and votes to execute a mortgage for the security of bondholders, which shall be a first lien—*Held*, not entitled, on petition, to execution and sale of land of the company, with priority.

On appeal from an order advised by Vice-Chancellor Bird, whose opinion is as follows:

The petition shows that Rue obtained a decree in this court on which a balance was due, and that he (the petitioner) took an assignment for a valuable consideration of one half of that balance. The petition also shows that the lands of the defendant company have been conveyed to the Freehold & New York R. Co., subject to the lien of his decree, and prays for a *fi. fa.* to make his money.

The Freehold & New York R. Co. and Mr. James P. Lowrey insist that there is nothing due to the petitioner. They urge that his interest was all sold and transferred by the proceedings in this court at the suit of Emson against the defendant company as an insolvent corporation, by the receiver appointed, who sold all the assets under an order of the court; and if not thereby sold and transferred, said interest was, in equity, sold and transferred, or that he agreed to transfer it to Lowrey; and if neither of these insistments be mentioned, then he is estopped as against the New York R. Co.

1. I do not think the rights or interests of the petitioner were affected by anything which the receiver did. I do not find that he was a party, in his individual capacity, in those proceedings. He was president of the defendant company, it is true, and in that suit, as such, the writ was served upon him; but our courts have uniformly held that proceedings against a defendant in a representative capacity do not render it proper or necessary for him to answer in his individual capacity. Wade *v.* Miller, 3 Vr. 296; Kirkpatrick *v.* Corning, 11 Stew. Eq. 234.

2. Nor do I find that there is any obligation, in equity, resting on the petitioner to assign or transfer his interest in said decree by virtue of the alleged agreement between him and Mr. Lowrey. I do not find that any agreement was consummated. That the two were negotiating is very certain, but there is no proof that they were ever of one mind upon the entire scope of the propositions submitted. A fair test would be the application of the doctrine at the foundation of the jurisdiction for specific performance. It seems to me that if the respondents were complainants in such case, with the testimony as it now stands before me, their failure would be most certain, because of the absence of a valid or binding agreement.

3. It seems equally clear to my mind that the doctrine of estoppel cannot be made available. It is said that when the assets of the Freehold & New York R. Co. were pledged by mortgage, the petitioner was present, and that in his presence, and by his vote, it was resolved that that mortgage should be the first lien on all the lands, etc., of the Freehold & New York R. Co. Supposing this to be true, it is very clear that, so far as the petitioner was concerned, everything that he did or consented to was in contemplation of the completion of his agreement, as he understood he had made it, with Mr. Lowrey. Besides, as the case stands before me, there is no room, under any circumstances, for the doctrine invoked. Mr. Lowrey is not in an attitude to stand on such a defence. He was a party to the negotiations, and knew that the alleged agreement had not been carried out. He also knew that the petitioner had no interest in the Freehold & New York R. Co., outside of that agreement, for, although he was named as a director thereof, there was only one share of the stock in his name, and that, I think, he did not own, he being a mere figure by way of counting, to aid Mr. Lowrey in perfecting his railway project, and counting only at the instance of Mr. Lowrey. Therefore, Mr. Lowrey is not sustained by the equitable principle contended for, nor is the Freehold & New York R. Co., for at that time, as I read the testimony, Mr. Lowrey was to all intents the company. The entire management was in his hands. At the period of time referred to, whatever acts others joined in, it seems to me they were at the bidding or direction of Mr. Lowrey. I think the petitioner

is entitled to the writ he asks for, with costs, and shall so advise.

W. H. Vredenburgh for appellants.

Joseph F. Randolph for respondent.

These two appeals were argued together, and as they involve substantially the same facts, are so considered and decided.

A final decree was rendered in the court of chancery on November 9, 1874, in favor of Jacob B. Rue, complainant, against the Monmouth County Agricultural R. Co., for unpaid purchase-money on sale of lands described in the decree, amounting to $2497.70, including costs of suit. This decree was assigned by Jacob B. Rue to John S. Schultze and Telfair Hodgson, January 26, 1875, each paying one half of the whole sum due on it. Prior to this decree, on October 1, 1872, the Monmouth County R. Co. had executed to William H. Brown and William Statsir, trustees, a mortgage on their railroad, lands, ways, franchises, and rights, to secure bonds to be issued, to the amount of $700,000. Two judgments were obtained by other parties prior to the decree in Rue's action. On November 23, 1875, Christian D. Emson, a stockholder, on behalf of himself and other stockholders, filed a bill to have the company declared insolvent, charging that the $700,000 mortgage and the bonds issued thereon were illegal, and praying for the appointment of a receiver and other relief. This bill made Schultze a party as assignee of the Rue decree, but not Hodgson (as his assignment was not recorded), but Hodgson was served with process as president of the Monmouth Agricultural R. Co., which was made a party to the suit. On December 10, 1875, a receiver was appointed. On December 14, 1875, the receiver filed a petition, setting forth, among other things, that the property was encumbered with a mortgage, the legality of which was brought in question, and that the property was of a character materially to deteriorate in value pending the litigation, and praying that he might be ordered to sell the real and personal estate and franchises of the company, free and clear of and from all encumbrances, the proceeds of sale to be brought into court to abide its further order, pursuant to the statute. A decree to that effect was made December 28, 1875, and on March 21, 1876, the receiver sold and conveyed to James P. Lowrey all the railroad property and franchises, free and clear of all encumbrances, for the sum of $115,000. At that time only the right of way had been purchased, and some grading done. The bonds issued under the $700,000 mortgage, amounting to $71,000, were satisfied and cancelled, and all debts and liens of the company settled, including the one half of the Rue decree assigned to Hodgson. This Lowrey claimed to own, and receipted for it to the receiver July 3, 1877. Lowrey conveyed to the Freehold & New York R. Co. all the property transferred to him by the receiver under the decree of the court of chancery. A mortgage for $100,000, and bonds to be secured thereby on the

railroad were directed, by resolution of the company, to be issued to John N. Whiting, trustee. The bonds were described therein as first mortgage bonds, and were issued July 1, 1878; another mortgage to secure $200,000 was executed, and bonds issued to take up the prior $100,000, and provide for the extension of the road to Keyport, and this, by its terms, was to be a first lien on the railroad. On May 20, 1882, Mr. Hodgson filed his petition in the original action of Jacob B. Rue against the Monmouth County Agricultural R. Co. to be made a party, and have execution for the amount claimed by him under the decree, and on October 28, 1884, an order for execution and sale was made. From this order the present appeal was taken by Lowrey and Whiting.

SCUDDER, J.—The petitioner claims that being the purchaser and owner of an undivided half part of the decree rendered in favor of Jacob B. Rue, a land-owner, November 9, 1874, he is en-
FACTS. titled to execution to sell the lands named therein, to satisfy his debt, with interest and costs. These lands are now part of the roadbed of the Freehold & New York R. Co. which purchased the road and franchises of the Monmouth County Agricultural R. Co., an insolvent corporation, and is now using them for railway purposes under its charter. The appellant, James P. Lowrey, purchased the property at the sale made by the receiver appointed by the court of chancery, and having completed the railroad, transferred and conveyed it to the Freehold & New York R. Co. Being still interested therein as stockholder and bondholder, grantor, and part owner of the decree, Lowrey was made a party under the petition, and has appealed from the order awarding execution and sale. John N. Whiting, the other appellant, to whom the mortgage was made in trust for $200,000 to secure bondholders, has also appealed from this order, to save the rights of those whom he represents.

The property of the insolvent company having been sold by the receiver under the Act of 1866 (Rev. p. 192, § 84) clear of encumbrances, it is first argued that this decree, owned in part by Hodgson, has been thereby cancelled, and that the only claim he can have is upon the proceeds of sale in the court, or in the hands of the receiver. But Hodgson was not made a party to the bill filed by Emson, as an individual, but only as president of the Monmouth County Agricultural R. Co. Lowrey assumes to act on settlement with the receiver, not only as representing the one half of the decree which had been transferred to him by Schultze, but also for Hodgson's half, which is claimed in these proceedings. It is obvious that Hodgson could not be bound by a decree in the action, wherein he was not made a party, nor could the fact that he was made such, as the presiding officer of the insolvent corporation, affect his private and individual interest, or take away the encumbrance of his

CANCELLATION OF DECREE BY SALE OF PROPERTY—PARTIES TO SUIT.

share of the Rue decree. Parties having adverse interests must be made parties in action. Wade *v.* Miller, 3 Vr. 296; Middleton *v.* N. J. West Line R. Co., 10 C. E. Gr. 306; Williamson *v.* N. J. Southern R. Co., 10 C. E. Gr. 13; Kirkpatrick *v.* Corning, 11 Stew. Eq. 234.

But Lowrey did not act without some show of authority in settling this decree, for, at the time, he was negotiating with Hodgson for the purchase and transfer of the latter's interest in it. Both were promoters of the railroad, and had shown great interest in its success. The formal offer for the purchase of the railroad was made by Lowrey to the receiver on March 15, 1876, and on March 16, 1876, he had written to Hodgson these words:

TRANSACTIONS BETWEEN LOWREY AND HODGSON.

"I have arranged as respects all the debts known to me, except the Rue judgment, of which as I understand, you own one half. Please tell me, at your earliest convenience, exactly what interest you have in this judgment, and what amount you will take in discharge thereof."

On May 29, 1876, he again wrote to Hodgson that he had completed the matter of the transfer to him of all the properties which were of the Monmouth County Agricultural R. Co., and requested to see him for a short time in connection with that matter, and asked that he would stop in the office and see him. Shortly after, and in the latter part of May, or prior to June 3, 1876, he did call, and, as Lowrey testifies, he fully stated to him the then exact position of affairs, and showed and read to him the proposition he had made to the receiver, Dickinson, and Hodgson agreed to look over his situation with respect to the railway company, and communicate with him what he wished to have done, with respect to his interest in the affair. Before June 3d he called again, and presented a paper written by himself, which was offered in evidence, showing his account with the company, including what he had paid on stock, his share of the Rue judgment and sundry amounts paid by him for the company, amounting in all to $15,086.50. This sum was divided in half in the statement, showing a product of $7543.25, and opposite this was written "seventy-six shares stock." On June 2, 1876, a letter was written by Lowrey to Hodgson, stating, among other things:

"I propose that you shall assign to me all your claims and rights of every nature upon the old company, including moneys advanced, the Rue judgment, and everything, upon my agreeing to cause to be issued to you upon the actual organization of the new company, not later than September 15th next, seventy-five shares of $100 each, of the capital stock of the new company, upon a basis of a capital of $200,000, or in that proportion, in whatever sum the capital may be fixed."

On June 15, 1876, Hodgson replied by postal card:

"I was to see you to-day, but you were out; will arrange the contract you sent as you wish, and bring it over soon."

On July 13, 1876, Hodgson again wrote:

"In regard to the assignment of my claim, etc., I will have it arranged, and bring it over before long."

Meanwhile, Lowrey entered into possession of the railroad under deed from Dickinson, receiver, dated March 17, 1876, acknowledged May 17, 1876, and recorded May 30, 1876, about which time the deeds appear to have been delivered, having satisfied or paid $71,000 of bonds issued on the $700,000 mortgage, and other outstanding claims amounting to over $115,000, and constructed the railroad from Freehold to Keyport. These were all preparatory to the organization of the new company. The Freehold & New York R. Co. was incorporated June 29, 1877, and by deed dated July 3, 1877, James P. Lowrey conveyed to this company the railroad and franchises, reciting therein, among other things, the receiver's deed to him. Mr. Hodgson was an incorporator and director named in the articles of association of the new company, which were signed by him. At the first meeting of the directors, June 29, 1877, he was present, voted to accept the deed from Lowrey, and for the mortgage to be executed to Whitney, as trustee, to secure an issue of $100,000 of bonds of the company to pay for the road; and he was also present at a meeting of the directors September 19, 1877, when a report was made of the conveyance by Lowrey and the execution of the mortgage to Whiting, which he voted to accept. Subsequently, in June, 1878, the board of directors of the railroad, of which Mr. Hodgson was still a member, directed, with his knowledge and concurrence, another mortgage to be made to Whiting to secure $200,000 of bonds of the company, whereof $100,000 in amount was to be reserved for exchange for the bonds of 1877; and it was resolved that this mortgage should cover and be the first lien upon, all the property of the company. Shortly before the organization of the new company, on or about June 1, 1877, Mr. Lowrey executed and delivered to Mr. Hodgson an agreement dated May 15, 1876, setting forth that, in consideration of the assignment to him of all the latter's claims of every nature against the Monmouth County Agricultural Co., he would cause to be issued to him seventy-five shares of the capital stock of the new company according to the terms of his proposition, above set forth. This paper was received by Mr. Hodgson, and has been retained by him without objection as to its terms, and without demand for the shares, or any action by him until the petition in this case was filed on June 9, 1882. Mr. Lowrey testifies that he has been continuously ready from the time the stock-books of the Freehold & New York R. Co. were opened, about July, 1887, to deliver to Mr. Hodgson the seventy-five shares of stock in shape of a certificate in his own name, with blank assignment, which he produces and tenders to the petitioner.

Mr. Hodgson went to reside in the State of Tennessee in 1878, where he has since lived, and there has been no communication between the parties since that time. Lowrey now says that he had forgotten that the actual transfer of the seventy-five shares had not been made to Hodgson, and Hodgson testifies that he was easy, supposing his lien was good under the Rue decree and could not be taken from him without some further act or assignment on his part. He seems not to have known, or to have forgotten, that he has so acted as to exclude all evidence of his claim against those who have subsequently acquired rights in this railroad, and that he is estopped by his conduct from enforcing his assigned decree against them in the form sought in his petition, that is, by a sale of a part of the road under execution, which would cut off the deeds of conveyance made by the new receiver to Lowrey, and from Lowrey to the Freehold & New York R. Co., the two mortgages to Whiting, and the bondholder secured thereby. He had knowledge and participated in the transfer of this title and its acceptance, and in the creation of these securities, which were declared to be first liens on all the property of the railroad, as already appears. He admits that he was present at the meeting of the directors, but says he was silent while the board was acting in these matters. But the concealment of his claim of a prior lien by virtue of the Rue decree evidently misled Lowrey, who transferred the title to the new corporation and accepted their bonds as part payment, on the assurance that they should be first liens, and upon the agreement which had been made between them that seventy-five shares of the capital stock of the railway company would be accepted in payment for the shares of the decree held by him, and the other indebtedness of the original company. His silence will be presumed, under the circumstances, to have been maintained with the intention that others should act, and if they acted to their detriment and to his advantage, he will be concluded. He was not only silent, but aided by his votes to put them in this position. Whiting, who represents, as trustee, the bondholders secured by mortgage, so far as appears in the evidence, took the mortgage in good faith, supposing it to be the first lien on the railroad, and cannot in this way be affected by the claim of priority of the Rue decree. This decree must be postponed to the rights of the new company acquired without notice of the petitioner's intention to insist on its priority, for he assented that the title should be free from all encumbrances; and to the rights of the mortgagee and bondholders of the new company, who have taken them as first liens on the railroad property, for he consented to this priority. His remedy against Lowrey remains unaffected by these proceedings, but his petition for the sale of the land of the company under execution, must be dismissed. The order for execution and sale will be reversed, with costs.

ESTOPPEL BY CONDUCT FROM ENFORCING DECREE.

Decree unanimously reversed.

PHILADELPHIA AND READING R. CO.

v.

SMITH.

(105 *Pennsylvania State Reports*, 195.)

The holder of overdue interest coupons and interest warrants, whether attached to or severed from bonds issued by a railroad corporation payable to bearer, may maintain an action thereon against the corporation, and may recover interest on the amount of said coupons and warrants from the time they became due and payable.

ERROR to the court of common pleas No. 3, of Philadelphia county:

Debt, by John F. Smith against the Philadelphia & Reading R. Co., to recover the amounts of (1) certain scrip certificates, (2) certain interest coupons attached to said certificates, and (3) certain detached interest warrants, originally annexed to bonds, (4) interest accrued on said coupons and warrants from the time the same became due and payable. The plaintiff filed copies of the said instruments, which, except as to numbering and amounts, were in the following form:

[SCRIP CERTIFICATE.]

No. 180. UNITED STATES OF AMERICA. $1,000.

STATE OF PENNSYLVANIA.

THE PHILADELPHIA & READING RAILROAD COMPANY.

This is to Certify. That the PHILADELPHIA & READING RAILROAD COMPANY is indebted to bearer in the sum of one thousand dollars lawful money of the United States of America, which sum the said Company promises to pay to bearer, at its office in the City of Philadelphia, on the first day of July, 1882, with interest thereon from the first day of July, A.D. 1877, at the rate of six per cent per annum, payable semi-annually, on the presentation and surrender of the annexed coupons as they respectively mature, both principal and interest being payable without deduction for any tax or taxes which the Company may, by any law of the United States or State of Pennsylvania, be required to retain therefrom for National or State purposes—the Company hereby agreeing to pay such taxes.

The principal of the indebtedness represented by this certificate shall at the option of the holder, be convertible, at par, into the bonds of the Philadelphia & Reading Railroad Company of the issue known as the Income Mortgage Loan, and secured by the mortgage bearing date the first day of December, A.D. 1876, executed and delivered by the said Company to Edwin M. Lewis, as mortgagee in trust; such conversion to be made, however, only on the presentation and surrender of certificates of this issue in sums of one thousand dollars, or any multiple thereof, with all unmatured coupons annexed, and

upon the payment of the excess of interest accrued on the said bonds over that accrued on the said certificates at the date of said conversion.

Witness the corporate seal of the said Philadelphia & Reading Railroad Company, duly attested, this thirtieth day of June, A.D. one thousand eight hundred and seventy-seven.

GEO. DEB. KEIM,
[SEAL.] *President pro tem.*

Attest:

D. J. BROWN, *Secretary.*

[COUPONS ATTACHED TO THE ABOVE.]

The Philadelphia & Reading Railroad Company

Will pay to bearer, at its office in the City of Philadelphia, *thirty dollars*, being six months' interest, due July 1, 1880, upon Scrip Certificate No. 130.

$30. D. J. BROWN, *Secretary.*

[INTEREST WARRANTS, DETACHED FROM BONDS.]

CONVERTIBLE LOAN 1873-93.

THE PHILADELPHIA AND READING RAILROAD COMPANY.

Interest Warrant on Bond No. 25.

THIRTY-FIVE DOLLARS.

Payable without deduction for taxes at the office of the Company in the City of Philadelphia.

JULY 1st, 1882.

$35. J. W. JONES, *Secretary.*

There was no defence to the claim to recover the principal of the scrip certificates, nor to recover the face amount of the interest coupons attached thereto. The defendant corporation, by its president, filed an affidavit of defence, averring:

"That copies of the respective bonds referred to in the said interest warrants, copies of which are filed, have not been filed, and that no action can be maintained upon the said interest warrants, as separate and distinct instruments.

"As to various coupons, Nos. 6 to 10 inclusive, due July 1, 1880, January 1 and July 1, 1881, January 1 and July 1, 1882, on $15,400 bonds due July 1, 1882, deponent is informed and believes that the plaintiff claims to recover judgment on the said bonds, copies of which have been filed, not only for the principal sum due thereon, and for interest on the said principal, which accrued from time to time, but that he also claims interest on the warrants or coupons from the date of their maturity, as if the same were distinct and independent obligations of the defendant; although the said unpaid interest warrants or coupons, as appears from the copy filed, were never detached from the certificates, but still remain component parts thereof; and on behalf of defendant, the deponent suggests that the interest recoverable in this suit is that only which has accrued upon the certificates themselves, and

not that which may be claimed to have accrued upon the undetached interest warrants or coupons."

The plaintiff took a rule to show cause why judgment should not be entered for the amount claimed, for want of a sufficient affidavit of defence, which rule the court, after argument, made absolute, and damages were assessed for the amount of the face of said scrip certificates, interest warrants, and interest coupons, together with interest at six per cent upon the amounts of said interest warrants and coupons, from the dates respectively when the same became due and payable.

The defendant thereupon took this writ of error. assigning for error *inter alia* the action of the court in entering judgment for the face value of the detached interest warrants, together with interest thereon, and for interest on said coupons from the several dates when the same respectively became due and payable.

Thomas Hart, Jr. (*Francis I. Gowan* with him), for the plaintiff in error.

M. Hampton Todd for the defendant in error.

MERCUR, C. J.—This contention is whether the holder of certain coupons and interest warrants can recover interest thereon from the time they became due and payable.

Each was given to furnish security for the prompt payment of the interest on bonds issued by the plaintiff in error. The one class of coupons was expressly made payable to bearer at the several times therein specified. They provided for the payment of the interest before the principal debt became due. They were designed to be severed from the bonds. They were intended to pass from hand to hand by delivery. They were payable in money, and at certain times designated. Their form and nature stamped them as the representatives of money. Each successive holder might well conclude that they were thrown on the market as negotiable paper to draw interest from maturity. It must be conceded as a general rule that interest upon interest cannot be enforced. As, however, interest is but hire for the use of money, there is nothing inequitable in a debtor agreeing to pay interest on it when wrongfully withheld. Rent is hire for the use of land, and interest on rent may be recovered. Obermyer *v.* Nichols, 6 Binn. 160; McQuesney *v.* Hiester, 9 Casey, 435; Newman *v.* Keffer, Id. 442 in note. Whenever equity requires the payment of interest on interest, an agreement to so pay it may be enforced. Pawling *v.* Pawling, 4 Yeates, 320. While it has been held that compound interest as a compensation merely for the detention of money cannot be allowed in Pennsylvania, yet if there be a special agreement to so pay, and in such form as to be valid, it may be recovered. Stokely *v.* Thompson, 10 Casey, 210; Robert's Appeal, 11 Norris, 420.

INTEREST COUPON HELD A NEGOTIABLE INSTRUMENT.

The affidavit of defence in the present case does not aver any readiness or willingness to pay the coupons or warrants when they become due. The case is one of persistent and continuous refusal to pay them. The manifest purpose in making them was to increase the market value of the bonds by giving assurance of the prompt payment of the interest. The intention was to give currency to them as a separate contract, which would carry with them the usual incident of interest in case of failure to pay at maturity. The purchasers and holders acquired them with that character reasonably stamped on their face. Why then shall they not draw interest after maturity? Why shall not the maker of this collateral agreement fulfil it, or suffer the usual penalty for its violation? The maker's act fairly intended to produce such effect. Whether they were afterwards actually detached from the original bonds is unimportant. They possessed the same independent agreement to pay the sums stated at the times specified. The company unjustly refused to pay the coupons according to the agreement. It is therefore equitable that they should draw interest. That they would do so is clearly implied by the terms of the contract. Bainbridge *v.* Wilcox, 1 Baldw. 536. Interest is therefore equitably demandable. Fries *v.* Watson, 5 S. & R. 222. The justice in holding that such coupons do draw interest was distinctly recognized, and the liability therefor affirmed, in County of Beaver *v.* Armstrong, 8 Wright, 63.

INTEREST ON INTEREST—INTEREST COUPONS BEAR INTEREST.

The other obligations called interest warrants are also coupons. They are for the payment of money at certain times therein specified. The language thereof differs some from the former; but the purpose and intention are the same. Although they lack express words of negotiability, yet they were executed to secure the payment of the sums therein stated before the maturity of the bonds to which they were attached. They were so prepared as to be detached therefrom, and give a separate cause of action. They were untrammelled by the name of any payee thereon to restrict the rights of the holder. The undoubted purpose and intention of these coupons being so clear, it follows that they draw interest after maturity. Although the consideration on which they were based is the interest on bonds, yet that does not change the effect to be given to them. In a suit on a similar coupon, it was so held in North Pennsylvania R. Co. *v.* Adams, 4 P. F. Smith, 94. The learned judge committed no error in ordering judgment for want of a sufficient affidavit of defence for the amount of the claim.

Judgment affirmed.

See next case.

PHILADELPHIA AND READING R. CO. *v.* FIDELITY INS., etc., CO.

HUNTINGDON & BROAD TOP MTN. R. AND COAL CO. *v.* WALN.

(105 *Pennsylvania State Reports*, 216.)

An action lies by the holder of coupons or interest warrants detached from corporation bonds payable to bearer.

Interest is recoverable upon such coupons or interest warrants from the time the same matured.

Philadelphia & Reading R. Co. *v.* Smith, *ante*, p. 399, followed.

Such an action is not limited to coupons which matured within six years prior to suit brought.

The right to bring such an action is not affected by the fact that the said bonds were secured by corporation mortgage executed pursuant to the Act of January 18, 1865.

1. ERROR to the court of common pleas No. 2 of Philadelphia county: Of July Term, 1883, No 145.

2. Error to the court of common pleas No. 1, of Philadelphia county: Of July Term 1883, No 141.

These two cases were argued and decided together in this court. The first was an action of debt, by the Fidelity Insurance, Trust & Safe Deposit Co. against the Philadelphia & Reading R. Co., upon 124 separate coupons or interest warrants, which had been originally attached to bonds of the defendant company. The plaintiff filed copies of said instruments, which were in the following form:

"*Convertible Loan* 1873–93.

"THE PHILADELPHIA AND READING RAILROAD COMPANY.

"*Interest Warrant on Bond No.* 194, *Thirty-five Dollars.*

"Payable without deduction for taxes at the office of the company, in the city of Philadelphia, January 1, 1883.

"$35. J. W. JONES,

"*Secretary.*"

The defendant company filed the following suggestion of defence: "That copies of the respective bonds referred to in the several interest warrants, copies of which are filed, have not been filed in this suit, and that no action can be maintained on the said instruments as separate and distinct instruments from said bonds. That none of the instruments of writing upon which suit is brought, are instruments of writing within the Acts of Assembly referring to affidavits of defence, and that no judgment can be entered thereon for want of such an affidavit."

The plaintiff took a rule to show cause why judgment should not be entered for want of a sufficient affidavit of defence, which rule the court, after argument, made absolute, and damages were

assessed for the amount of said coupons, together with interest thereon from the dates when the same respectively became due and payable. The defendant took this writ of error, assigning for error the entry of said judgment, and the allowance of interest on the face amounts of the coupons.

The second of the above cases was an action of debt by John R. Waln against the Huntingdon & Broad Top Mountain R. & Coal Co., upon 96 separate coupons which had been originally attached to bonds of the defendant company, and which represented the interest accrued upon said bonds from April 1, 1871, to October 1, 1882. The plaintiff filed copies of the coupons, which were in the following form:

"CONSOLIDATED MORTGAGE LOAN.

"*Interest Warrant. Due April* 1, 1871.

"The Huntingdon & Broad Top Mountain Railroad & Coal Company will pay to bearer, at their office in the city of Philadelphia, thirty-five dollars, being six months' interest on Bond No. 157.

"$35. "J. P. ABETSEN,

"*Treasurer.*"

The plaintiff also filed copies of four bonds, to which certain of said coupons had originally been attached, said bonds being in the following form:

"*Consolidated Mortgage Loan.*

"UNITED STATES OF AMERICA.

"*State of Pennsylvania.*

"THE HUNTINGTON AND BROAD TOP MOUNTAIN RAILROAD AND COAL COMPANY

"$1000. $1000.

"Acknowledge themselves indebted to the bearer in the sum of one thousand dollars, lawful money of the United States, which sum the said company promises to pay to bearer on the 31st day of March, 1895, with interest at the rate of seven per cent per annum, payable semi-annually on the first days of April and October, in each year, at the office of the company, in the city of Philadelphia, upon the delivery of the annexed warrants, respectively.

"The holder of this bond is entitled to the security of a mortgage, dated March 1, 1865, by the said Railroad & Coal Company, of its railroad and franchises, depots, water-stations, shops, and equipment, executed according to an Act of Assembly, approved January 18, 1865, to S. Morris Waln, Rothwell Wilson, and J. Gillingham Fell, in trust, to secure the full and final payment of the bonds to be issued under this mortgage, by the said company, and not to exceed in all one million five hundred thousand dollars.

"This bond shall be transferable by delivery, or it may be registered as to its ownership on a register, to be kept by the company, and being so registered, it shall then be transferable only on the books of the company until released from such registry on said books by its owner.

"*In Witness Whereof*, The said Railroad & Coal Company has caused its corporate seal to be hereto affixed and the same to be attested by the sig-

natures of its president and secretary, and has also caused the coupons hereto annexed to be signed by its treasurer, the first day of March, in the year of our Lord eighteen hundred and sixty-five.

"L. I. WATTSON, [SEAL.]
"*President.*

"Attest: "J. P. AERTSEN,
[STAMP.] "*Secretary.*"

Plaintiff further filed an averment of demand and refusal of payment, and claimed the amount of said coupons, together with interest thereon from the dates when the same respectively matured.

The defendant company filed an affidavit of defence, averring, *inter ali*, as follows:

"The plaintiff files as the instruments of writing sued on, copies of four bonds of the corporation defendants and of sundry coupons. The bonds are under seal; the coupons are unsealed instruments. None of the bonds sued on have matured, and suit cannot be maintained thereon prior to the 1st day of April, A.D. 1895. All the coupons, of which copies have been filed, have been served and detached from the respective bonds to which, before severance, they belonged. They have been sued on in the present suit as separate and independent instruments of writing; none of them are under seal. All of the said coupons, which matured prior to the 28th day of March, 1867, are barred by the Statute of Limitations, as more than six years intervene between the maturity of these coupons and the commencement of this suit.

"Deponent further suggests that after seventeen of the said coupons sued on from the respective bonds, there remained attached, as part of the bonds, the coupons that will mature between the present time and the year 1895, when the bonds fell due. And as no copy is filed with these coupons, if plaintiff claims thereon as an entire instrument of writing, then the copy filed is not a true copy of the bonds as they exist, and not being a copy of the entire instrument sued on, the plaintiff is not entitled to a judgment thereon for want of an affidavit of defence. . . .

"This deponent further states that it appears by the said bonds that the holder thereof is entitled to the security of a mortgage dated March 1, 1865, executed by the corporation defendant, of its railroad, franchise, depots, water-stations, shops and equipment, which said mortgage contained the following trust. . . . This deponent states that this mode being provided by the said mortgage whereby the real and personal estate of the said corporation defendant may be made available for the payment of the principal and interest of the said bonds, that it would be contrary to equity and good conscience, and in violation of the trust created by the said mortgage, and of the contract subsisting between the holders of the bonds secured thereby, that any one or more of the said holders should levy on or sell any part of the mortgaged premises

by execution on any judgment obtained upon the said coupons or attempt to obtain satisfaction upon the mortgaged premises in any other mode than that provided in the said mortgage.

"Deponent, therefore, suggests that if the court should be of the opinion that the plaintiff is entitled to judgment, that the plaintiff may be restrained from levying upon any portion of the mortgaged premises by process issued by the said judgment."

The plaintiff took a rule to show cause why judgment should not be entered for want of sufficient affidavit of defence, which rule the court, after argument, made absolute, and damages were assessed for the amount of said 96 coupons with interest from the dates of maturity thereof. The defendant took this writ of error, assigning for error the entry of said judgment, the allowance of interest on the coupons, and the overruling of that portion of the affidavit of defence which set up the bar of the Statute of Limitations as to so many of the coupons in suit as matured more than six years prior to the commencement of the action.

Thomas Hart, Jr., and *James E. Gowen* (*James W. Paul* with them) for the plaintiffs in error in both cases.

R. C. McMurtrie for the Fidelity Ins., etc., Co., defendant in error.

S. Morris Waln for John R. Waln, defendant in error.

MERCUR, C.J.—These cases were argued altogether. The suits were on certain coupons or interest warrants, originally attached to bonds executed by the respective plaintiffs in error.

Two objections only to a recovery were made in the affidavit of defence. One was the not filing a copy of the bonds to which the coupons had originally been attached, and the averment that no action could be maintained on the coupons as separate and distinct instruments. The other was that the coupons were not such instruments of writing as to require an affidavit of defence. The contention is therefore restricted to these objections.

The main question as to the character of the coupons was fully considered and decided in Philadelphia & Reading R. Co. *v.* Smith, a case in which judgment has just been entered. We deem it unnecessary to repeat the reasons there given for holding that coupons of this character possess a legal status in the hands of the holder. It follows that an action thereon may be maintained in his name, without filing any copy of the bond to which it was originally attached.

As these coupons possess such a separate character, and call for the payment of money at a specific time, they clearly constitute such instruments of writing as to require the makers thereof to interpose an affidavit of defence to prevent judgment thereon.

Judgment affirmed in each case.

See Note to Gilbert v. Washington City, etc., R. Co., 1 Am. & Eng. R. R. Cas. 516.

Articles in Mortgage relating to Default in Payment of Interest Construed.—Articles 12 and 13 of the mortgage deed of trust of the Missouri, Kansas, & Texas R. Co. to the Union Trust Co., Trustee, provided as follows:

Article 12. "In case default shall be made in payment of any interest upon either of said bonds when the same becomes due and payable, or in payment of any sum or sums of money hereinbefore provided to be made for the creation of said sinking fund, and such default shall continue for six months after the same has been demanded, the whole principal sums mentioned in each and all of said bonds then outstanding shall, at the option of holders of a majority in interest of said bonds, become forthwith due and payable; and in such case it shall be lawful for said party of the second part, [the trust company], its successor or successors, to enter upon all and singular the railroads, property, and premises hereby conveyed, and to have, hold, use, and operate the same, until the same shall have been sold or otherwise disposed of," etc.

Article 13: "In case default be so made and continued as aforesaid, that is, for six months after demand, the party of the second part, its successor or successors in trust, may also, and upon the written request of the holders of at least one thousand of such bonds then outstanding, amounting to one million of dollars, shall foreclose this mortgage by legal proceedings," or sell or cause it to be sold at auction in the city of New York, etc.

As construed by the court, article 12 was held to give the trust company power to enter and hold possession only in case there has been a default in the payment of interest, and a majority of the bondholders had elected to have the whole sum secured by the mortgage to become due. Article 13 was held to give the trustee power to enter and hold possession of the road only in case of default in the payment of interest, followed by a written demand of the holders of at least 1000 bonds to foreclose the mortgage. Union Trust Co. v. Missouri, K. & T. R. Co., 26 Fed. Repr. 485.

Bolinger, Adm'r, etc.,

v.

St. Paul and Duluth R. Co.

(*Advance Case, Minnesota. February* 11, 1887.)

In an action for damages for the alleged negligent killing of plaintiff's intestate by defendant's cars at a railway crossing, *held*, that when the circumstances connected with the accident in this case were shown, including the speed of the train and the manner in which it was operated, it was for the jury to say whether, with regard to the safety of travellers, the rate of speed and management of the train was reasonably prudent.

The accident occurring on a public thoroughfare in a city, it was also for the jury to determine whether the presence of a watchman or other precautions not taken were reasonably necessary for the safety of the public.

Held, also, upon the evidence in this case, that the question whether the deceased exercised reasonable caution and prudence while approaching the crossing was also properly submitted to the jury.

It appearing that the deceased left a wife and children surviving, and was a strong, healthy man, in middle life, accustomed to earn good wages, the damages allowed by the jury to the amount of $5000 were not so clearly excessive and unreasonable as to warrant this court in setting aside the verdict for such cause.

APPEAL from district court, Ramsey county.

J. D. O'Brien and *Otto Kueffner* for respondent, Bolinger.

Jas. Smith, Jr., *J. J. Egan*, and *I. V. D. Heard* for appellant, St. Paul & D. R. Co.

VANDERBURGH, J.—The deceased was fatally injured on the evening of Christmas, 1884, by defendant's cars, which came in collision with the sleigh in which he was riding at the place where the tracks of the company cross Third street, in the city of St. Paul. The accident is alleged to have been caused by the negligence of defendant, particularly in running its cars at a dangerous rate of speed, and in failing to give any proper signal or warning of their approach at the crossing. The evidence tended to show that the cars in question were box cars, which were being backed or pushed across the street at the time; that they were running at a higher rate of speed than allowed by the city ordinance; that it was after dark, being past 6 o'clock in the evening; that the street was in use as one of the thoroughfares of the city; that there was then no watchman or flag-man at the crossing; and that the driver of the vehicle saw or heard no signal, and had no notice of the approach of cars in time to escape. FACTS.

The evidence was undoubtedly sufficient to sustain a finding of negligence on defendant's part by the jury. When the situation at the crossing, and the manner of running the train, the number and duties of the employes in charge, the rate of speed, the extent of travel upon the street, and the opportunity for observation, were shown, it was peculiarly for the jury to determine whether the rate of speed was reasonable, and the defendant's management of the train otherwise reasonably prudent. Howard *v.* Railroad Co., 32 Minn. 214, 20 N. W. Rep. 93.

It was also for the jury to determine whether a flag-man or other precautions not used were necessary for the safety of travellers at the particular time and place, and how far any negligence which might rightfully be imputed to the defendant in any of the particulars we have mentioned was the efficient cause of the accident. Shaber *v.* Railroad Co., 28 Minn. 107, 108, 9 N. W. Rep. 575; Kelly *v.* Railroad Co., 29 Minn. 3, 11 N. W. Rep. 67. FLAGMAN.

2. It is not so clear upon the evidence that there may not have been contributory negligence on the part of the driver of the sleigh; but the testimony in plaintiff's behalf presented a case for

the jury. The jury would consider to what extent the position of the freight-house, or cars standing on the street, as shown by some of the testimony, obscured the vision of the parties in the sleigh as they were approaching the track, in connection with other facts above referred to, and also the evidence of the driver, and those with him, that they looked and listened for the cars, and that he caused the horse to walk slowly for this purpose when he came near the crossing, and that they heard or saw nothing to warn them of danger until too late to retreat. It was for the jury to say, if they believed the witnesses, whether these precautions on the part of the deceased were, under the circumstances, reasonably sufficient. Faber *v.* Railroad Co., 29 Minn. 469, 13 N. W. Rep. 902; Kelly *v.* Railroad Co., 29 Minn. 4, 11 N. W. Rep. 67.

CONTRIBUTORY NEGLIGENCE.

3. The jury gave round damages, but the trial judge, on the motion for a new trial, has found no cause to interfere with the verdict on this ground, and we do not think this court warranted in declaring them excessive under the evidence in the case. The deceased was a strong, healthy man, 48 years of age, who earned good wages as a day laborer. He left a wife and three children, two of whom were under the age of 21 years. The statute authorizes an action for damages for the benefit of the widow and next of kin. The jury, in such cases, may consider prospective advantages of a pecuniary nature which have been cut off by the premature death (in this case) of the husband and father. The value of the services of the head of a family in a pecuniary sense cannot be limited to the amount of his daily wages earned for their support. His constant daily services, attention, and care in their behalf, in the relation which he sustained to them, may be considered as well; and the jury must judge of the circumstances of each case. In such cases damages for mere loss of society or mental sufferings are not to be included. The damages are to be calculated upon a reasonable expectation of pecuniary benefit of right, or otherwise, from the continuance of the life. Shaber *v.* Railroad Co., 28 Minn. 107, 9 N. W. Rep. 575.

DAMAGES.

"At the best," as remarked by Allen, J., in Green *v.* Railroad Co., 32 Barb. 32, "the measure of damages must be somewhat indefinite, and much must be left to the good judgment of the jury."

The statute is to be construed as a remedial one, and must have a liberal interpretation to effectuate the evident purpose of its enactment. The determination of the amount of damages, however, must be a judicial one, and is not left to the uncontrolled discretion of the jury; and verdicts have not infrequently been set aside or reduced in this class of cases; but very rarely, we think, in a case like this, where the deceased is the head of a

family, in middle life, apparently able to care and provide for them, and in various ways render them valuable assistance and service. Carey *v.* Berkshire R. Co., 48 Amer. Dec. 64; 13 Suth. Dam. 282, 283; Tilley *v.* Railroad Co., 29 N. Y. 252.

Order affirmed.

See note to Wakelin *v.* London, etc., R. Co., *post.*

BATTISHILL, by her Next Friend,

v.

HUMPHERY *et al.*, Receivers, etc.

(*Advance Case, Michigan. January* 27, 1887.)

The absence of a flag-man at a street crossing of a railroad is no evidence of negligence on the part of the company, unless the necessity for stationing and maintaining such flag-man at the particular crossing has been determined upon and required by the railroad commissioner. Section 3365, How. St.

Backing an engine, with tender in front, and hauling train behind the engine, is no evidence of negligence. It might call for greater vigilance upon the part of train hands in looking out.

When the court refuses to give specific requests to the jury, and in general charge fails to state reasons, or give any explanation, it may well be considered that the jury will treat such refusal as liberty to infer that the requests are wrong in law.

Council have a right, in opening case to jury, to use a diagram, which they claim correctly represents the location and surroundings where the injury complained of is alleged to have been inflicted, as a part of the testimony he expect to prove by living witnesses. The subsequent proof and admission of the diagram, and its use on the trial, will not cure the error committed in denying such right.

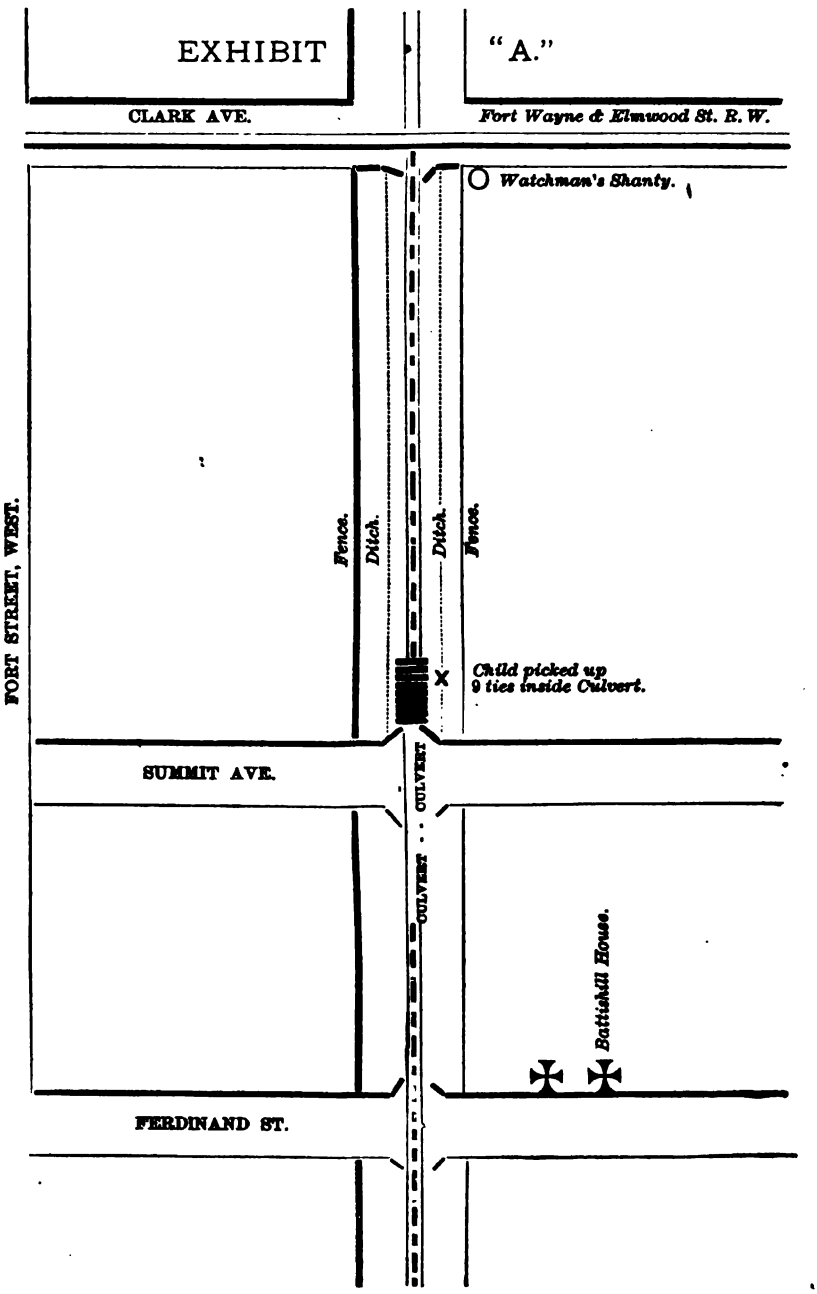
ERROR to Wayne.

Suit by infant plaintiff to recover damages for injuries received by negligence of defendants in running train.

Griffin & Warner for plaintiff.

Alfred Russell for defendants and appellants.

MORSE, J.—This is an action for damages for personal injuries sustained by plaintiff, by reason of an accident to her, July 8, 1884, at Summit-avenue crossing, Spring Wells, near Detroit. The Wabash, St. Louis & Pacific Railway was at this time operated by receivers, and the accident is charged to the negligence of the employees. Plaintiff was a child about three years of age. Her father and mother lived on Ferdinand street, FACTS.


EXHIBIT
"A."
CLARK AVE.
Fort Wayne & Elmwood St. R. W.
Watchman's Shanty.
Fence.
Ditch.
Ditch.
Fence.
Child picked up
9 ties inside Culvert.
FORT STREET, WEST.
SUMMIT AVE.
CULVERT
CULVERT
Battishill House.
FERDINAND ST.

a block next west of Summit avenue, and were poor people. The father, at the time of the injury, was away at work, and the mother had gone down-town for groceries. She left the child at home with her father, an old gentleman and an invalid. He was 79 years of age; and, when the mother went away, he was lying down in bed, and the child was in the room with him playing with a kitten. The mother left the house at half-past 2 P.M. and returned a quarter before 6. She testified that she expected the grandfather to look after the child. At the time of the trial the old man was at his son's residence in Kingsville, Canada, and was not a witness. The parents lived 150 feet from the railroad track south, on Ferdinand street or avenue. The track of the railway of the defendant runs east and west across Ferdinand street, Summit avenue, and Clark avenue, as shown by the diagram hereto attached. The Fort Wayne and Elmwood Street Railway, upon which the child's father was a car-conductor, ran along Park avenue, crossing defendant's road. At this crossing the flag-man or watchman was stationed by the railroad company. When he saw the train three miles away, it was his duty to stand on the crossing with his flag. He had a clear view up to Summit avenue, and the train could be seen at a distance of two and one half miles. There was no flag-man on Summit avenue, and no gate there. The child left the house, and went up the track of the company, and was picked up, after the accident, at the spot indicated upon the diagram.

Two witnesses, sworn on the part of the plaintiff, saw the accident. Frank Brandt was unloading cinders from a car standing on a side track a little ways from Clark avenue, about a block west of Summit avenue. Was standing on the car. The train came from the west. He saw it when about half a block away from the child, who was on the track. She was run over. The cars did not stop after the accident. They were on the main track; the engine was backing, with the tender foremost. Five cars were attached. The enginer and fireman were on their seats as they passed. "The flag-man was standing on Clark avenue. He saw the child. He did not signal the train. The train was going about as fast as a horse could trot whon I first saw it,—about five or six miles an hour. There no bell rung or whistle blown at the crossing at Summit avenue, nor any signal given to the child that I heard. The first signal that I heard was when they whistled for Clark avenue, afer the accident." George Lewis, a boy 10 years old, was on the fence by Mr. Battishill's house. Saw Maud first playing in the dirt road; saw her go on the track. He saw the train coming a block west from her, and ran to her, and tried to pull her off the track. She was trying to cross the culvert, going east. He got hold of her by the arms, but her stocking caught on the spikes. The train ran over her leg, cutting it off. She would have been killed had he not pulled her away. The train was going about as

fast as witness could run. Other testimony was given, on plaintiff's behalf, that the engine was backing towards the east with the smoke-stack of the engine towards the cars; that no bell was rung or whistle blown until after the little girl was run over. Then the whistle was blown for Clark avenue.

Thomas Melosh, the flag-man, was sworn on the part of the defendant, and testified that 15 or 20 minutes before the accident he saw the child, Maud, playing with other children upon the railroad track, within the inclosed premises of the company, between Summit and Clark avenues; that he frightened them away, and they went across the commons towards Battishill's house. He further testified that he was stationed on Clark avenue to save accidents. It was a pleasant day in July, and the sun was shining. Standing west of the crossing with his flag in his hand, he has a clear view of either side of the railroad up to Summit avenue. "Can see every point on the road, and every point on each side of the road." He was asked, on cross-examination, the following question: "*Question*—Did you say to Mr. Brandt, when the train was coming, and you saw the child upon the track, or, looking in that direction, did Mr. Brandt ask you to wave your flag, and check the train, and did you say: 'Damn the child,' or 'damn the children; let them get run over. I would not care if a hundred of them were run over?' *Answer*—If you want, I will ask you a good question on that what I have done." This question was objected to by defendant's counsel on the ground that what he said or did would not bind the receivers; that it was irrelevant, immaterial, and incompetent; it was no part of the *res gestæ*, and not connected with the accident in any way; it did not come under the plaintiff's declaration. The court then said that he thought counsel was right upon that point; but he assumed, from the manner the question was put, that it was for the purpose of showing the witness' mind and feeling upon the subject and subject-matter upon which he had been testifying. He thought it incompetent for that purpose, as the witness' feeling might bear upon his credibility; but any such expression of his could not bind the company. The counsel for plaintiff, Mr. Griffin, said: "It affects his credibility entirely. Your honor related the rule correctly—that his statement was not evidence—when we offered it as a part of our case; but, if the witness made the statement, then his whole testimony is injured. There is no doubt about that. If he made the statement, his whole testimony is untrue. It is for the purpose of showing that when he says that he did not see this child upon the track, and that she stumbled headlong and head-first in under a box car—It is for the purpose of showing that he not only saw her, but his attention was called to it, and he was asked to wave his flag, and he expressed himself in the way he did, indicating that he saw the child, but that he did not care enough about it to wave the flag.

The Court—I think the question is competent. [Exception for defendant.] *Mr. Griffin*—I will just modify the question a little by putting something in front of it. [The question is withdrawn for the present.] *Question*—Will you state whether Mr. Brandt called your attention to the child upon the track previous to the time the train reached it, and asked you to wave your flag, and check the train, and did you say: 'Damn the child,' or 'damn the children; let them get run over. I wouldn't care if a hundred of them were run over'? *Mr. Russell*—I object to that question upon this ground: beeause there is no allegation in the declaration that it was the duty,—that there is no statement in the declaration that the flag-man saw the train coming, that it was his duty to flag the train and stop it, and that he omitted to perform that duty. The question is whether or not he was requested to wave the flag, and whether or not he refused, and said, 'Damn the children.' Your honor ruled in a case against the F. & P. M. Ry., and it was ruled by the supreme court in the case of Huntly *v.* The Grand Rapids & Ind., and in the case of Stark *v.* The Flint & Pere Marquette, that it was necessary to set out in the declaration the particnlar duty, and to negative the performance of the duty. My brother is trying to show that it was specially requested of this witness to stop that train by making a signal, and that he did not do it, and used opprobrious terms in refusing to do it; but he has not said a word in his declaration upon the subject. He has not advised us that he expected to show it, and I therefore object to it. *The Court*—You may put the question. [Exception for the defendant.] *Mr. Griffin*—It has nothing to do with the *res gestæ* whatever; it bears upon this witness' credibility merely. [Questions repeated.] *Answer*—No, sir; not those words,—never those words went out of my head. No, sir.

Upon rebuttal the witness Brandt was recalled by the plaintiff, and asked the following question. "*Question*—Mr. Brandt, did you call the attention of Mr. Melosh to the child upon the track, when the train was approaching it in an easterly direction, and did he say: 'Damn the kid; let her get run over. If a hundred of them would get run over, folks would learn to keep their children at home'?" This was objected to by defendant's counsel upon the same grounds stated when such inquiry was made of Melosh, and for the additional reason that it was not a contradiction of that witness upon a material point. The court replied to such objections that "it would not be evidence, on the *res gestæ*, what that flag-man said, yet it was evidence as to the credibility," and permitted the question to be answered. The witness Brandt thereupon answered: "Yes."

The engineer testified, upon the part of defendant, that he did not see the child, but could see as close to the tender as he could if the engine was running forward. "At the rate we were going when

we got to Summit avenue, I might have stopped the train in going the length of the engine tender, and five cars, if I had seen the child. . . . If we whistled off brakes, and the brakes were applied, at the rate we were going, and the engine was reversed, I suppose we could have stopped it in ten feet."

The fireman gave evidence that the whistle was sounded sharply twice, 40 rods before reaching Summit avenue, and the bell rung continuously until the crossing was passed, and he did not see the child; knew nothing about the accident until he got back to Delray. Both brakemen were on top of the train. The train was running not to exceed four miles an hour. Saw the flag-man when the train passed Clark avenue. He said nothing.

Frank Bailey, brakeman, testifies that he was on the train, forward, but did not see the child, and did not know anything about the accident until the train returned.

Robert Henderson was helping the brakeman that day. He testifies the whistle was blown 110 to 130 feet west of Summit avenue, and that there was a continuous ringing of the bell. He was on top of a box car, next to the engine, at the time of passing Summit avenue. He swears that he had an unobstructed view, and could have seen the child, but did not see her. On cross-examination he said: "It is not my business to look out in any particular, but everywhere. It is not so much my duty to look out for the track as it is to see that the cars are in proper condition."

We have given in substance all the evidence necessary to notice in the discussion of the errors alleged.

The counsel for defendant asked the court to instruct the jury that the plaintiff could not recover, which request was refused. He also requested the court to give other charges to the jury to the effect that, under the law, the absence of a flag-man at Summit avenue was no evidence of negligence upon the part of the company; nor was the backing of the engine, tender foremost, hauling the train, any evidence of negligence; that there was no evidence of negligence in the case as respects a usual and proper lookout upon the train; that there was no evidence of the child being on a crossing when struck, and therefore the ringing of the bell or blowing of the whistle became unimportant, because these signals are only required at crossings; but the affirmative evidence that the bell was rung and the whistle sounded, should overcome the negative testimony of witness in that respect. Which requests were refused, except as they were embraced in the general charge.

We now proceed to examine the alleged errors, as the plaintiff recovered a judgment in the court below in the sum of $4000.

1. As to the admission of the remark alleged to have been made by the watchman when his attention was directed to the child. The objections to this evidence are substantially quoted in the language of Mr. Russell, stated upon the trial. It is true, there

is no allegation in the declaration alleging in any way that the injury to the child was occasioned by the negligence or wantonness of the watchman, and therefore the conduct or language of this employee could not be relied upon in this suit to prove negligence in the defendants, Marquette, H. & O. R. Co. *v.* Marcott, 41 Mich. 433, 2 N. W. Rep. 795; Flint & P. M. R. Co. *v.* Stark, 38 Mich. 714. But the evidence was not offered or received for any such purpose. Melosh was introduced as a witness, and sworn on behalf of the defendants, and testified substantially that he did not see the child for 15 minutes before the accident, and that, about that number of minutes before the accident, he saw the child and others playing within the inclosed ground of the company, between Summit and Clark avenues, and that he frightened them away, and that they went across the commons towards the house of the child's father. This testimony must have been offered to support the claim advanced upon the trial by defendant's counsel that, when the train came along, the child was playing in the ditch beside the track, where she could not be seen by the engineer or brakeman upon the train, and suddenly jumped upon the track, and was run over before she could be seen. This watchman had an unobstructed view of the track and the sides of the track, and his direct evidence tended to show that the child could not be seen in time to prevent the injury. To dispute this it was certainly proper to show that the child was in plain sight, and that his attention was directed to her. The remark made by him would not be proper in contradiction of the witness, but in my opinion it was competent as going to his credibility as a witness. It was offered by plaintiff's counsel, and received by the court for that purpose, and that purpose only. The court expressly stated that his language could not bind the company, and that it would only bear upon his credibility as a witness. The *animus*, feeling, or interest of a witness can always be shown; and, if he denies such feeling or interest, he can be contradicted upon that point. Threadgool *v.* Litogot, 22 Mich. 270; Geary *v.* People, 22 Mich. 220; Crippen *v.* People, 8 Mich. 117; Beaubien *v.* Cicotte, 12 Mich. 460; Patten *v.* People, 18 Mich. 314; Hamilton *v.* People, 29 Mich. 173.

EVIDENCE—ADMISSION OF REMARK OF WATCHMAN.

2. The counsel for the defendants contends that the case should have been taken from the jury principally for the reasons that the evidence shows the parents to have been negligent, and that the child was a trespasser upon the track. In this case the child is suing by her next friend, and the question arises in such case whether the negligence of the parents, if admitted, can defeat her recovery? The question of their negligence in this case was submitted to the jury. The question has never been directly adjudicated in this State.

NON-SUIT.

It is held by the courts of some of the States, notably in Maine,

Massachusetts, New York, and Indiana, that the negligence of the parents, when the child is of such tender years as to be incapable itself of such negligence, will preclude a recovery upon the part of the child suing by her next friend. If the child be not able to judge for itself whether or not the place is one of danger, it is held to be the duty of its parents, or those having charge of the child, to judge for it; and, if they neglect this duty, their blame must be imputed to and suffered by the child. Hartfield *v.* Roper, 21 Wend. 615; Mangam *v.* Brooklyn R. Co., 38 N. Y. 455; Ihl *v.* Forty-second St. R. Co., 47 N. Y. 317, 323; Holly *v.* Boston Gas-light Co., 8 Gray, 123–132; Wright *v.* Malden & M. R. Co., 4 Allen, 283; Lynch *v.* Smith, 104 Mass. 52; Messenger *v.* Dennie, 137 Mass. 197; Callahan *v.* Bean, 9 Allen, 401; Pittsburg R. Co. *v.* Vining, 27 Ind. 513; Lafayette R. Co. *v.* Huffman, 28 Ind. 287; Jeffersonville R. Co. *v.* Bowen, 40 Ind. 545; Shear. & R. Neg. § 48; Brown *v.* European R. Co., 58 Me. 384; Leslie *v.* Lewiston, 62 Me. 468; Ewen *v.* Chicago R. Co., 38 Wis. 613–628; Toledo W. & W. R. Co. *v.* Grable, 88 Ill. 441. The English courts also hold to the same doctrine. Singleton *v.* Eastern Counties R., 7 C. B. (N. S.) 287; Waite *v.* Northeastern R., El. Bl. & El. 719, 728; Mangan *v.* Atterton, L. R. 1 Exch. 239. This proposition that the negligence of the parents or guardian of a child in allowing such child to stray away or go out unattended, has been modified by the courts holding to this rule in a great many instances so as, in practice, greatly to reduce its mischief; some holding that the question of such negligence is always one for the jury to determine, and that no rule of law can be laid down which interferes with the jury judging each case on its own merits. Mulligan *v.* Curtis, 100 Mass. 512; Lynch *v.* Smith, 104 Mass. 52; Mangam *v.* Brooklyn R. Co., 38 N. Y. 455; Karr *v.* Parks, 40 Cal. 188, 193; Schierhold *v.* North Beach & M. R. Co., 40 Cal. 447.

The courts of many States reject the rule laid down in 21 Wend., and followed by the courts of Maine and Massachusetts. It was early questioned by Chief Justice Redfield of Vermont, in the case of Robinson *v.* Cone, 22 Vt. 213–224, who said: "We are satisfied that, although a child or idiot or lunatic may, to some extent, have escaped into the highway, and so be improperly there, yet, if he is hurt by the negligence of the defendant, he is not precluded from his redress." Agnew, J., in a Pennsylvania case, says: "The doctrine which imputes the negligence of the parent to the child in such a case as this is repulsive to our natural instincts, and repugnant to the condition of that class of persons who have to maintain life by daily toil." Kay *v.* Pennsylvania R. Co., 65 Pa. St. 269; North Pennsylvania R. Co. *v.* Mahoney, 57 Pa. St. 187; Philadelphia & R. Co. *v.* Spearen, 47 Pa. St. 300; Daley *v.* Normick, 26 Conn. 598; Boland *v.* Missouri R. Co., 36 Mo. 490; Whirley *v.* Whiteman, 1 Head, 620; Bellefontaine & I. R. Co. *v.*

Snyder, 18 Ohio St. 399; Government St. R. Co. *v.* Hanlon, 53 Ala. 70; Keffe *v.* Milwaukee & St. P. R. Co., 21 Minn. 207; St. Paul *v.* Kuby, 8 Minn. 154 (Gil. 125); Railroad Co. *v.* Manson, 30 Ohio St. 451–470; Galveston, H. & H. R. Co. *v.* Moore, 59 Tex. 64–68; Norfolk & P. Co. *v.* Ormsby, 27 Grat. 455; Huff *v.* Ames, 19 N. W. Rep. 623–625; Whart. Neg. (2d Ed.) §§ 313, 314.

In this State the question has been brought before this court in one or two cases, but has not been directly passed upon.

In Powers *v.* Harlow, 53 Mich. 507, 19 N. W. Rep. 257, Cooley, C. J., says, at page 512: "When the case was submitted to the jury, the circuit judge instructed them to return a verdict for the defendant. This he did, upon the ground that it is the duty of parents to take care of their children, and to see that they do not commit trespass, and if they do not do that, but suffer the children to wander away upon other people's property, the children go there at their own risk, and the negligence is contributory on the part of the parties allowing them to wander where they have no right. And this negligence of the parents is, for the purposes of legal remedy, imputable to the children themselves. This instruction was probably given in reliance upon Hargreaves *v.* Deacon, 25 Mich. 1, which was such a case as the instruction supposed." The learned judge then proceeds to show from the facts that the child was not a trespasser, and that no negligence could be imputed to the father or the child, and reverses the judgment. The case came to this court again, and is reported in 57 Mich. —, and 23 N. W. Rep. 606. The case was tried in the circuit court for the county of Marquette, and judgment there rendered in favor of the plaintiff, and affirmed in this court. It was again contended in the trial in the circuit, and on argument in this court, that the father of the plaintiff was grossly negligent in permitting the plaintiff, a boy of about eight years, to be about the shed where he, the father, knew dynamite and explosives were stored. The matter was not passed upon by this court, as it was considered to be a question for the jury, whose finding could not be disturbed by us. A claim was made, however, further, that the plaintiff's mother, in his presence, made the statement that the boy had been frequently warned of the presence of the explosives, and told to let them alone. The plaintiff, at the time this remark of the mother was made, was under the influence of an anæsthetic, and the physician could not say that he was in a condition to understand what was going on. The circuit judge on the trial below ordered the statement of the mother to be stricken from the testimony. Error was alleged upon this ruling, and it was argued in this court that the mother, as well as the father, was the natural guardian of the boy, and that, as such guardian, she was chargeable with care of him, and her negligence was imputable to him. From this it was further claimed that her admissions were admissible against him to prove his or

her fault. Chief Justice Cooley, in referring to this last contention, very clearly and pertinently disposed of it in the following language: "No authority is cited to this, and we are aware of none. The natural guardian has no power to admit away the rights of the ward whose person is committed to his custody. He is guardian of the person only, having no control of any estate the ward may possess, and could not be given a control except upon judicial proceedings, and after giving security for responsible care. This being so, it cannot be plausibly claimed that by an irresponsible admission he may deprive his ward of important rights. A right of action is as much property as is a corporal possession, and, in the case of a miner, is protected by law in the same way and under the same securities. The mother could not release it, even for full consideration, and by the most formal instrument. Much less, therefore, could she, by mere word of mouth, when not under oath, or otherwise chargeable with responsibility, destroy his right of action by her admissions. The circuit judge was therefore right in his ruling." This argument of the learned judge seems to me to be irrefutable; and, if so, the query arises whether this same natural guardian can, by his conduct,—by his negligence, either voluntary or involuntary,—destroy a right of action which he cannot admit away by word of mouth or the most formal writing. It seems plain to me that he cannot, but I shall speak of this further on.

In the case of Keyser *v.* Chicago & G. T. R. Co., 56 Mich. 559, 23 N. W. Rep. 311, the question of the parent's negligence was again brought to the attention of this court. In the opinion filed in that case, Justice Sherwood rejected the doctrine that the child, two and one half years old, could be a trespasser upon the railroad track to the extent of subjecting himself, without the right of redress, to the negligent acts or omissions of the defendant company, and said that the question of the parent's negligence was, under the circumstances, properly submitted to the jury.

It is also claimed that in two other cases the court has, in effect, adopted the New York and Massachusetts rule as to the negligence of the parents being a bar to the right of action upon the part of the child Hargreaves *v.* Deacon, 25 Mich. 1; East Saginaw C. R. Co. *v.* Bohn, 27 Mich. 503. I can find no shadow of authority for this claim, as regards the first-named case, as the negligence of the parents of the child is not even so much as mentioned in the opinion filed in that case. In the latter case the point was made by the defendant that the mother of the child was negligent to such a degree as to preclude the recovery by the infant. It was simply held in that case in this court, that the mother, from the facts, could not be presumed to have been negligent. The question whether such negligence, if it had existed, would have prevented the right of action, was not passed upon except by inference.

It may be contended that these decisions of our court, above referred to, have assumed, by inference at least, that the negligence of the parents would defeat an action in the name and right of the infant. Be this as it may, it has certainly been treated as a proper question for the jury to decide in most cases; and in this particular case I am satisfied, if the rule be as claimed, that there was no error in submitting the question to the jury. But I am not content to let the question pass as a settled one in this State. At least, I am not willing to assent to the proposition that the negligence of any other person can become the contributory negligence of a plaintiff without his fault. It is settled, and must be so, that a child of tender years, of the age of this child in the case at bar, is not capable of fault or negligence in itself, and, if not, I fail to perceive how, by any course of reasoning, it can be made responsible for the fault of another, no matter whom it may be.

I can better state my own convictions than to use the language of the supreme court of Ohio (Welch, J.), as follows: It is well settled that an adult person capable of self-control cannot recover for injuries occasioned by negligence when he has himself been guilty of negligence which contributed to the result. This rule of law is founded upon reasons and considerations of justice and public policy, which it seems to us are wholly inapplicable to the case of an infant plaintiff. The reasons and considerations are: (1) The mutuality of the wrong, entitling each party alike, where both are injured, to his action against the other, if it entitles either; (2) the impolicy of allowing a party to recover for his own wrong; and (3) the policy of making the personal interests of parties dependent upon their own prudence and care. All these are wanting in the case of an infant plaintiff. No action can be maintained against him for the negligence of his parent or custodian; and it is difficult to perceive what principle of public policy is to be subserved, or how it can be reconciled with justice to the infant, to make his personal rights dependent upon the good or bad conduct of others. It is the old doctrine of the father eating grapes, and the child's teeth being set on edge. The strong objection to it is its palpable injustice to the infant. Can it be true, and is such the law, that if only one party offends against an infant he has his action, but that if two offend against him their faults neutralize each other, and he is without remedy? His right is to have an action against both."

The contrary doctrine would abandon the young and helpless, whom the courts bound to protect, to the not always tender mercies of parents and guardians, and to wanton ill treatment and injury, without hope of redress. Parents are sometimes improvident and careless, without any wickedness of heart or evil intent, and guardians are apt to be more careless and negligent of their

wards than parents are of their children. The incapacity of the child should not be made to expose it to hurt or death, without redress or remedy, because of the fault, wanton or careless, of its natural protectors. The law aims to guard and shield children of tender years from the abuse of parents as well as of strangers. Why, then, should the fault of the parent,—his wrong against the child,—if contributing to the wrong of a stranger, exonerate the latter?

Judge Cooley, in his work upon Torts, in a note to his discussions of this question, on page 682, says that it may be urged with some plausibility that the doctrine of the New York court "is more likely to guard the interests of the children and imbeciles than is the opposite. If a heartless parent may suffer a child to take his first lessons in walking in the crowded streets of a city, and then, when he is injured or killed, as in all probability he would be, may recover for such injury or killing on the ground that the child himself is too young to be chargeable with negligence; there will not, perhaps, be wanting depraved custodians of children, unrestrained by any consideration of humanity, willing enough to count upon probable gains from such reckless conduct." But this argument must be predicted upon rare exceptions to the general rule of human conduct, and presupposes cases where parents are willing to maim or murder their offspring from avaricious motives. While such extreme and wicked motives may exist, they are, in this enlightened age, and in our civilization, of very rare occurrence, and it will not do to found the policy of our law upon them. It is the child that is to be guarded and protected by the courts; and the care cannot be too tender, nor the means of defence against injury too effective. There are a thousand cases of carelessness or heedlessness, without wantonness, to one of actual evil intent, and the policy of the law ought to be shaped as against the former. Therefore, if the injury is occasioned by the negligence of the defendant,—if the child be injured when it ought not to have been if reasonable and proper means of precaution had been used,—the negligence or fault of the parent or guardian ought not, in my opinion, to be taken into account. If the father or other person be suing on his own account for damages to him, arising from loss of service, then the contributory negligence of the person so suing applies, as in other cases; but, when the child brings the action, it should not be made responsible for another's fault beyond its consent or control.

This little girl should not hobble upon crutches through life because its mother was inconsiderate and careless of its welfare and safety, if the employees of the defendants are blamable for the loss of its limb. I agree with Justice Sherwood, in the case heretofore cited, Keyser *v.* Chicago & G. T. R. Co., that this child cannot

be made or considered a trespasser upon the track of this railroad company. And the weight of authority elsewhere is decidedly against the position that a child of the age of this one can be a trespasser, so as to justify or excuse the negligence of the company, if such negligence is found. Lynch *v.* Nurdin, 1 Adol. & E. (N. S.) 20; Railroad Co. *v.* Stout, 17 Wall. 657; Daley *v.* Norwich & W. R. Co., 26 Conn. 591; Birge *v.* Gardiner 19 Conn. 507; Chicago & A. R. Co. *v.* Gregory, 58 Ill. 226; Kay *v.* Pennsylvania R. Co., 65 Pa. St. 269; Bellefontaine & I. R. Co. *v.* Snyner, 18 Ohio St. 400; Isabel *v.* Hannibal & St. J. R. Co., 60 Mo. 475; Keffe *v.* Milwaukee & St. P. R. Co., 21 Minn. 207; Kansas Cent. R. Co. *v.* Fitszimmons, 22 Kan. 686. A child of such a tender age as to be incapable of negligence cannot well become a trespasser. The circuit judge was right in instructing the jury that the little girl was not a trespasser.

3. I think the second request of the defendant should have been given, to wit: "The railroad law of this State (article 4, § 3) lays upon the railroad commissioners of this State the duty of determining the necessity of establishing a flag-man upon any particular street crossing of a railway; and upon the testimony, and under the pleadings in this case, the absence of a flag-man at Summit avenue is no evidence of negligence upon the part of the receivers." No reference was made to this matter in the charge of the court; and it may well be considered, when a request is especially made, and it is refused, that the jury will take such refusal as a liberty to infer that the request is wrong in law, unless some explanation is made by the court of the reasons for such refusal to rebut such natural inference. It is contended by the counsel for plaintiff that no claim of negligence on this account was made upon the trial; but evidence of this nature was introduced, and the request which ought to have been given denied, and we cannot say it did not have some influence upon the jury in determining the question of the negligence of the company.

DUTY TO KEEP FLAGMAN

4. "The fact that the engine of the train was backing, tender foremost, hauling the train behind the engine, is no evidence of negligence upon the part of the defendants, and is not so charged in the declaration." This request was refused, and no reference made to it in the charge of the court. For the reasons given in reference to the third proposition, there was error in this refusal, as the charge was proper, and should have been given. The engine being reversed might call for greater vigilance upon the part of the train hands in looking out, but of itself was no evidence of negligence.

BACKING TRAIN.

5. It is claimed that there was no evidence tending to show the want of a proper lookout upon the train. I think there was such

evidence. It is true, the brakemen were on the top of the cars, and in a proper position as lookouts, but there is testimony tending
LOOKOUT. to show they did not look ahead for obstructions on the track, as they ought to have done. One of them testifies that he could have seen the child had he looked, but his business was more particularly to see if the cars kept in place. The others testify they did not see the child, but do not claim that they looked out for any one upon the track. It was especially the duty of the train hands, in passing over a street crossing where no flag-man was employed, to keep a vigilant lookout for persons or vehicles upon the track. There was an unobstructed view of this track for two miles before reaching Summit avenue, and from all the evidence in this record, I cannot say that the jury were not warranted in finding negligence in this respect. Nor can the charge of the court be criticised as to this branch of the case.

6. I think there was evidence tending to show the child was on the crossing, though she was endeavoring, at the time of the accident, to reach the premises of defendant by crawling across the cattle-guard or culvert.

7. The question of the weight of testimony as to the blowing of the whistle and ringing of the bell was for the jury, and properly submitted to them.

8. Upon the opening of defendant's counsel, after the plaintiff had rested, he attempted to explain the evidence that he should introduce in defendant's behalf by a diagram of the premises. He was not permitted to use this diagram by the court. We think he should have been allowed to do so.

I find no other error in the proceedings. Because of those noted above, a new trial must be granted, and the judgment below reversed, with costs.

SHERWOOD, J.—I concur in the result.

CAMPBELL, C. J.—I concur in granting a new trial. But I do not think the so-called discrediting testimony of the flag-man was competent. Had the case gone upon his negligence as a ground of action, it might have been competent impeaching testimony, but there can be no impeachment on irrelevant matters. The question of imputed negligence does not seem to me to be necessarily involved in the case, and I do not think it desirable to discuss its limitations.

CHAMPLIN, J., concurred.

See next case and note.

JANE WAKELIN, Appellant,

v.

LONDON AND SOUTHWESTERN R. Co., Respondents.

(*L. R.* 12 *House of Lords*, 41.)

A railway line crossed a public footpath on the level, the approaches to the crossing being guarded by hand-gates. A watchman who was employed by the railway company to take charge of the gates and crossing during the day was withdrawn at night.

The dead body of a man was found on the line near the level crossing at night, the man having been killed by a train which carried the usual head-lights but did not whistle or otherwise give warning of its approach. No evidence was given of the circumstance under which the deceased got on to the line.

An action on the ground of negligence having been brought by the administratrix of the deceased, the jury found a verdict for the plaintiff.

Held, affirming the decision of the court of appeal, that even assuming (but without deciding) that there was evidence of negligence on the part of the company, yet there was no evidence to connect such negligence with the accident: that there was therefore no case to go to the jury, and that the railway company were not liable.

Observations as to the onus of proof with regard to contributory negligence.

APPEAL from a decision of the court of appeal.

The action was brought by the administratrix of Henry Wakelin on behalf of herself and her children under Lord Campbell's Act, 9 & 10 Vict. c. 93.

The statement of claim alleged that the defendant's line between Chiswick Station and Chiswick Junction crossed a public footway, and that on the 1st of May, 1882, the defendants so negligently and unskilfully drove a train on the line across the footpath and so neglected to take precautions in respect of the train and the crossing that the train struck and killed one Henry Wakelin, the plaintiff's husband, whilst lawfully on the footpath.

The statement of defence admitted that on that day the plaintiff's husband whilst on or near the footpath was struck by a train of the defendants, and so injured that he died, but denied the alleged negligence; did not admit that the deceased was lawfully crossing the line at the time in question; and alleged that his death was caused by his own negligence and that he might by the exercise of reasonable caution have seen the train approaching and avoided the accident.

At the trial before Manisty, J., and a special jury in Middlesex in December, 1883, the following evidence was given on behalf of the plaintiff. It appeared from the defendant's answer to interrogatories that the crossing was a level crossing open to all foot-passengers; that the approaches to the crossing on each side of the line were guarded by hand-gates; that there was a slight curve at

the crossing; that assuming the deceased to have been crossing the line from the down side and standing inside the hand-gates but not on the line, he could have seen a train approaching on the down side at a distance of nearly if not quite half a mile, but that when standing in the centre of the line he could have seen a train approaching on the down side at a distance of more than one mile; that the body of the deceased was found on the down side of the line, and that he was run upon and killed by a down train; that the engine carried the usual and proper head-lights, which were visible at the distances above mentioned; that the company did not give any special signal or take any extraordinary precautions while their trains were travelling over the crossing; that a watchman in the company's employ was on duty from 8 A.M. to 8 P.M. to take charge of the gates and crossing, and amongst other duties to provide for the safety of foot-passengers.

Oral evidence was given that from the cottage where the deceased lived it would take about ten minutes to walk to the crossing; that he left his cottage on the evening of the 1st of May after tea, and that he was never seen again till his body was found the same night on the down line near the crossing. There was no evidence as to the circumstances under which he got on to the line. Witnesses for the plaintiff gave evidence (not very intelligible) as to the limited number of yards at which an approaching train could be seen from the crossing, and as to obstructions to the view.

The defendant called no witnesses, and submitted that there was no case. Manisty, J., left the case to the jury, who returned a verdict for the plaintiff for £800. The Divisional Court (Grove, J., Huddleston, B., and Hawkins, J.) set aside the verdict and entered judgment for the defendants. The court of appeal (Brett, M.R., Bowen and Fry, L.JJ.) on the 16th of May, 1884, affirmed this decision. In the course of his judgment Brett, M.R., said that in his opinion the plaintiff in this case was not only bound to give evidence of negligence on the part of the defendants which was a cause of the death of the deceased, but was also bound to give *prima facie* evidence that the deceased was not guilty of negligence contributing to the accident; and that by reason of the plaintiff having been unable to give any evidence of the circumstances of the accident, she had failed in giving evidence of that necessary part of her *prima facie* case.

From this decision the plaintiff appealed.

Acland for appellant.

Murphy, Q.C., and *Arbuthnot* (*Arthur Charles*, Q.C., with them) for respondents.

Acland replied.

The House took time for consideration.

LORD HALSBURY, L.C.—My Lords, it is incumbent upon the plaintiff in this case to establish by proof that her husband's death had been caused by some negligence of the defendants, some negligent act, or some negligent omission, to which the injury complained of in this case, the death of the husband, is attributable. That is the fact to be proved. If that fact is not proved the plaintiff fails, and if in the absence of direct proof the circumstances which are established are equally consistent with the allegation of the plaintiff as with the denial of the defendants, the plaintiff fails, for the very simple reason that the plaintiff is bound to establish the affirmative of the proposition; "Ei qui affirmat non ei qui negat incumbit probatio." I am not certain that it will not be found that the question of onus of proof and of what onus of proof plaintiff undertook, with which the court of appeal has dealt so much at large, is not rather a question of subtlety of language than a question of law. NEGLIGENCE ESSENTIAL.

If the simple proposition with which I started is accurate, it is manifest that the plaintiff, who gives evidence of a state of facts which is equally consistent with the wrong of which she complains having been caused by—in the sense that it could not have occurred without—her husband's own negligence as by the negligence of the defendants, does not prove that it was caused by the defendant's negligence. She may indeed establish that the event has occurred through the joint negligence of both, but if that is the state of the evidence the plaintiff fails, because "in pari delicto potior est conditio defendentis." It is true that the onus of proof may shift from time to time as matter of evidence, but still the question must ultimately arise whether the person who is bound to prove the affirmative of the issue, i.e., in this case the negligent act done, has discharged herself of that burden. I am of opinion that the plaintiff does not do this unless she proves that the defendants have caused the injury in the sense which I have explained.

In this case I am unable to see any evidence of how this unfortunate calamity occurred. One may surmise, and it is but surmise and not evidence, that the unfortunate man was knocked down by a passing train while on the level crossing; but assuming in the plaintiff's favor that fact to be established, is there anything to show that the train ran over the man rather than that the man ran against the train? I understand the admission in the answer to the sixth interrogatory to be simply an admission that the death of the plaintiff's husband was caused by contact with the train. If there are two moving bodies which come in contact, whether ships, or carriages, or even persons, it is not uncommon to hear the person complaining of the injury describe it as having been caused by his ship, or his carriage, or himself having been run into, or run down, or run upon; but if a NO EVIDENCE OF HOW ACCIDENT OCCURRED.

man ran across an approaching train so close that he was struck by it, is it more true to say that the engine ran down the man, or that the man ran against the engine? Neither man nor engine were intended to come in contact, but each advanced to such a point that contact was accomplished.

Again, is there any legal presumption that people are careful and look before them on crossing a railway, or even when they do see the approach of a train that they never cross when the train is dangerously near? And yet if one of these hypotheses were established the plaintiff must fail, while on the other side it would be extremely difficult to lay down as a matter of law that precautions which the legislature has not enjoined should be observed by a railway company in the ordinary conduct of their traffic. Railway companies are permitted to establish their undertakings for the express purpose of running trains at high speed along their lines. Rightly or wrongly the legislature have permitted the railways to cross roadways on a level, and it must be taken that the legislature, wherever they have given that authority, and without requiring special measures of precaution, have left to the railway company the discretion of using their lines in a reasonable and proper fashion. I can understand that circumstances might exist which might call upon the railway company to take unusual precautions, though not prescribed by statute, but the peculiarity about this case is that no one knows what the circumstances were. The body of the deceased man was found in the neighborhood of the level crossing on the down line, but neither by direct evidence nor by reasonable inference can any conclusion be arrived at as to the circumstances causing his death.

PRESUMPTION AS TO CARE.

It has been argued before your Lordships that we must take the facts as found by the jury. I do not know what facts the jury are supposed to have found, nor is it, perhaps, very material to inquire, because if they have found that the defendant's negligence caused the death of the plaintiff's husband, they have found it without a fragment of evidence to justify such a finding.

Under these circumstances, I move that the judgment appealed from be affirmed, and the appeal be dismissed.

LORD WATSON.—My Lords, in the view which I take of the evidence adduced at the trial before Manisty, J., it may not be absolutely necessary to say anything in regard to the onus which attaches to the plaintiff in this and similar cases. I shall nevertheless express my opinion upon the point, because it was discussed in the judgments delivered in the court of appeal, and has been fully and ably argued at your Lordships' bar.

It appears to me that in all such cases the liability of the defendant company must rest upon these facts,—in the first place

that there was some negligent act or omission on the part of the company or their servants which materially contributed to the injury or death complained of, and, in the second place, that there was no contributory negligence on the part of the injured or deceased person. But it does not, in my opinion, necessarily follow that the whole burden of proof is cast upon the plaintiff. That it lies with the plaintiff to prove the first of these propositions does not admit of dispute. Mere allegation or proof that the company were guilty of negligence is altogether irrelevant; they might be guilty of many negligent acts or omissions, which might possibly have occasioned injury to somebody, but had no connection whatever with the injury for which redress is sought, and therefore the plaintiff must allege and prove, not merely that they were negligent, but that their negligence caused or materially contributed to the injury.

ONUS PROBANDI.

I am of opinion that the onus of proving affirmatively that there was contributory negligence on the part of the person injured rests, in the first instance, upon the defendants, and that in the absence of evidence tending to that conclusion, the plaintiff is not bound to prove the negative in order to entitle her to a verdict in her favor. That opinion was expressed by Lord Hatherley and Lord Penzance in the Dublin, Wicklow & Wexford R. Co. *v.* Slattery, 3 App. Cas. 1169, 1180. I agree with these noble lords in thinking that, whether the question of such contributory negligence arises on a plea of "not guilty," or is made the subject of a counter issue, it is substantially a matter of defence, and I do not find that the other noble lords, who took part in the decision of Slattery's Case, said anything to the contrary. In expressing my own opinion, I have added the words "in the first instance," because in the course of the trial the onus may be shifted to the plaintiff so as to justify a finding in the defendants' favor to which they would not otherwise have been entitled.

The difficulty of dealing with the question of onus in cases like the present arises from the fact that in most cases it is well-nigh impossible for the plaintiff to lay his evidence before a jury or the court without disclosing circumstances which either point to or tend to rebut the conclusion that the injured party was guilty of contributory negligence. If the plaintiff's evidence were sufficient to show that the negligence of the defendants did materially contribute to the injury, and threw no light upon the question of the injured party's negligence, then I should be of opinion that, in the absence of any counter-evidence from the defendants, it ought to be presumed that, in point of fact, there was no such contributory negligence. Even if the plaintiff's evidence did disclose facts and circumstances bearing upon that question, which were neither sufficient *per se* to prove such contributory negligence, nor to cast

the onus of disproving it on the plaintiff, I should remain of the same opinion. Of course a plaintiff who comes into court with an unfounded action may have to submit to the inconvenience of having his adversary's defence proved by his own witnesses; but that cannot affect the question upon whom the onus lies in the first instance. As Lord Hatherly said in Dublin, Wicklow & Wexford R. Co. *v.* Slattery, 3 App. Cas. 1169: "If such contributory negligence be admitted by the plaintiff, or be proven by the plaintiff's witnesses while establishing negligence against the defendants, I do not think there is anything left for the jury to decide, there being no contest of fact."

In the present case, I think the appellant must fail, because no attempt has been made to bring evidence in support of her allegations up to the point at which the question of contributory negligence becomes material. The evidence appears to me to show that the injuries which caused the death of Henry Wakelin were occasioned by contact with an engine or a train belonging to the respondents, and I am willing to assume, although I am by no means satisfied, that it has also been proved that they were in certain respects negligent. The evidence goes no further. It affords ample materials for conjecturing that the death may possibly have been occasioned by that negligence, but it furnishes no data from which an inference can be reasonably drawn that as a matter of fact it was so occasioned.

I am accordingly of opinion that the order appealed from must be affirmed.

LORD BLACKBURN.—My Lords, I have had the advantage of perusing in print the opinion just delivered by my noble and learned friend. In it I perfectly agree.

LORD FITZGERALD.—My Lords, the case of the plaintiff appellant whose husband was killed on the railway is thus put in the amended statement of claim:—"The defendants so negligently and unskilfully drove a train on the said line across the said pub-
FACTS. lic footpath, and so neglected to take such precautions in respect to the said train and the said public footpath as were necessary to prevent injury to the public with respect to the crossing of the said public footpath that the said train struck the said Henry Wakelin, the husband of the plaintiff, whilst lawfully on the said footpath, and so injured the said Henry Wakelin that he died therefrom."

The defendants deny the whole of these allegations, save that Wakelin was killed by a train of the defendants on or near the footpath. No living person appears to have witnessed the occurrence, and the evidence given at the trial does not show under what circumstances or how or at what precise time the deceased met his death.

We have only the admission on the pleadings "that on the 1st May, 1882, Henry Wakelin, while on or near a certain public footpath across the defendants' railway, called Dean's Crossing, was struck by a train belonging to the defendant company, and so injured that he died on the said day." The unfortunate deceased was found dead on the railway, and we know nothing more of the particulars attending his death, save so far as the admission in the pleadings may be supplemented by any inference to be drawn from the defendants' answer to the 6th of the interrogatories, "that the body of plaintiff's husband was found on the down side of the line, and he was run upon and killed by a down train."

There was evidence also intended to establish negligence on the part of the defendants, in the absence of due and proper precautions for the safety of the public using that footpath. It seems to me that there was evidence of negligence, but it did not go so far as to establish that such negligence led to the death of Wakelin. It fell short of proving that the immediate and proximate cause of the calamity was the negligence of the defendants. We are left to mere conjecture as to whether it was the *causa causans*, and that we cannot resort to. The plaintiff undertook to establish negligence as a fact, and that such negligence was the cause of her husband's death. She failed to do so, and the proper course to have adopted at the close of the plaintiff's case was to have directed a verdict for the defendants.

Manisty, J., sent two questions to the jury: "Was there negligence on the part of the company? 2. Was there negligence on the part of the deceased man? If you do come to the conclusion that the plaintiff is entitled to your verdict, that is to say, that it was entirely and wholly due to the negligence on the part of the company, what damages do you think the plaintiff is entitled to?" The jury found for the plaintiff, which was equivalent to a finding in the affirmative on the first question and in the negative on the second, but notwithstanding their finding the learned judge appears to have so seriously doubted that he sent the parties to move for judgment in the Divisional Court. The Divisional Court entered up judgment for the defendants, and in my opinion the decision was right, though I am not prepared to adopt entirely the reasons expressed by that tribunal for its decision.

It is not necessary for me to add another word, and I would refrain from doing so if there had not been some reasons given both in the divisional court and in the court of appeal which I am not prepared to assent to without further consideration. I understand the Master of the Rolls to have laid down that the plaintiff in such a case is bound to establish, first, negligence on the part of the defendants; second, that such negligence caused the injury

of which the plaintiff complains; and further, if not involved in number two, that the plaintiff was bound on his case to give affirmative evidence of the negative proposition that he did not negligently contribute to the accident. The latter proposition was not very much pressed in argument before us. It is not necessary for your Lordships to come to any decision on it, but I desire to guard myself against being supposed now to assent to it.

Probably in most cases it will be found to be a contest of words only. Contributory negligence in such a case as the present seems to me to consist of the absence of that ordinary care which a sentient being ought reasonably to have taken for his own safety, and which had it been exercised would have enabled him to avoid the injury of which he complains, or the doing of some act which he ought not to have done, and but for which the calamity would not have occurred. I have used the words "ordinary care;" extraordinary caution is not required, but if by the use of ordinary caution he might have avoided the injury, and did not, he is not entitled to recover damages.

CONTRIBUTORY NEGLIGENCE.

Before the passing of Lord Campbell's act, 9 & 10 Vict. c. 93, in a common-law action for an injury alleged to have been caused by the negligence of the defendant, and when that most convenient plea "not guilty" was permitted, I always understood that if the defendant relied as a defence on contributory negligence, though he was permitted to establish it under "not guilty," yet the issue lay on him, and I am not aware that any different rule has been established since the passing of that statute, or since the practice has been adopted of putting in special defences, whether the action was at common law for a personal injury or under the statute for a wrongful act causing the death. The plaintiff does not in the statement of claim allege in terms the absence of contributory negligence, and the defendant if he relies on it does so affirmatively by special defence, as in the case now before us. "The defendants further say that the death of the said Henry Wakelin was caused by his own negligence, and that he might and could by the exercise of reasonable care and caution have seen the train approaching and avoided the accident."

It has been truly said that the propositions of negligence and contributory negligence are in such cases as that now before your Lordships so interwoven as that contributory negligence, if any, is generally brought out and established on the evidence of the plaintiff's witnesses. In such a case, if there is no conflict on the facts in proof, the judge may withdraw the question from the jury and direct a verdict for the defendant, or if there is conflict or doubt as to the proper inference to be deduced from the facts in proof, then it is for the jury to decide. But if the plaintiff

can establish his case in proof without disclosing any matters amounting to contributory negligence or from which it can be reasonably inferred—then the defendant is left to give such evidence as he can to sustain that issue.

It may be that the practice of the law has in this respect been altered, or ought to be established on the basis pointed out by the master of the rolls, but as yet that has not been shown to our satisfaction.

There is another proposition in the judgment of the master of the rolls relating to the same subject-matter expressed thus:—"But although the plaintiff had given in the first instance *primâ facie* evidence of an absence of negligence on his part, if the defendant brought forward evidence which was contradictory of that, then you came again with the burden of proof upon the plaintiff, because, if upon the conflict of that evidence, part of which was given by the plaintiff and part by the defendant, the jury or the tribunal which had to try the fact is left in doubt whether the plaintiff was or was not negligent, contributing to the accident, the verdict and judgment must be for the defendant, because the burthen of proof lies wholly on the plaintiff." If the noble and learned master of the rolls means that if the evidence is such that the jury might reasonably come to a conclusion in favor of the plaintiff or might reasonably draw a contrary inference, the case is to be withdrawn from the decision of the jury and a verdict and judgment go for the defendant, I desire to say that I am not to be taken as acquiescing in that proposition.

I am of opinion that the order of the court of appeal should be affirmed.

Order appealed from affirmed and appeal dismissed.

Person on Crossing is not a Trespasser.—A person who is on a crossing of a railway is not a trespasser, and as to such person a railway company must use reasonable care. Kay *v.* Penna. R. Co., 65 Pa. St. 269; Phila & R. Co. *v.* Trautman, 11 Wkly. Notes of Cases, 453; Davis *v.* Chicago & N. W R. Co., 15 Am. & Eng. R. R. Cases, 424; Barry *v.* N. Y. Cent. & H. R. R. Co. 92 N. Y. 289; Sibley *v.* Ellis, 11 Gray, 417; Pittsburg, etc., R. Co. *v.* Dunn, 56 Pa. St. 284; Baltimore & O. R. Co. *v.* Schwindling, 12 Wkly. Notes of Cases, 349. The crossing may not be technically a public crossing. It is sufficient if it has been used as such by the public with the consent of the railway company. As remarked in Taylor *v.* President, etc., Del. & H. C. Co., Atlantic Repr. 43, 44, "While such user does not convert the company's right of way into a public highway, it certainly does relieve persons passing over the same from being treated as trespassers on the company's premises; and there is a manifest distinction between the degree of care which a railroad company is bound to exercise towards mere trespassers and those who may be using the right of way by tacit consent or implied permission of the company. In the case of such long-continued user by the public, the company and its employees are charged with notice of the fact, and therefore cannot with impunity neglect precautions to prevent danger to persons thus using the same."

Duty to Look and Listen at Crossing—Negligence.—It is the duty of one approaching a railway crossing to stop at a reasonable distance from the road and both look and listen for approaching trains, and if he knows of the existence of an obstacle to a sufficient survey of the railroad at one point, it is his duty to seek to make a survey at some other more favorable point before trying to cross; and a failure in this regard amounts to contributory negligence, which will bar recovery for injuries caused by a collision with a passing train. Lake Shore, etc., R. Co. *v.* Miller, 25 Mich. 274; Mich. Cent. R. Co. *v.* Coleman, 28 Mich. 440; Haas *v.* Grand Rapids, etc., R. Co., 47 Mich. 401; Wood *v.* Detroit, etc., R. Co., 54 Mich. 402; Pzolla *v.* Mich. Cent. R. Co., 54 Mich. 273; Rhoades *v.* Chicago & G. T. R. Co., 58 Mich. 263; North Pa. R. Co. *v.* Heileman, 49 Pa. St. 60; Pa. R. *v.* Beale, 73 Pa. St. 504; Schufert *v.* Chicago, M. & St. P. R. Co., 62 Iowa, 624; 14 Am. & Eng. R. R. Cas. 696; Turner *v.* Hannibal, etc., R. Co., 74 Mo. 602; Benton *v.* Iowa Cent. R. Co., 42 Iowa, 193; Gorton *v.* Erie R. Co., 45 N. Y. 660; Moore *v.* Cent. R., 24 N. J. L. 268; Delaware, L. & W. R. Co. *v.* Toffey, 38 N. J. L. 525.

Signals at Crossing; both Bell and Whistle not Necessary.—The Missouri statute of March 26, 1881 (Acts 1881, p. 79), makes it the duty of a railroad company to ring a bell or sound a steam whistle upon its trains on approaching a public crossing; but it does not require that both the bell and whistle should be sounded. In an action for an injury received at such a crossing the second count of the complaint, averring neglect to ring the bell, was held defective, because it did not also aver a failure to sound the whistle. The third count, which alleged a failure to sound the whistle, was also held defective, because it failed to allege a neglect to ring the bell. Terry *v.* St. Louis & San Francisco R. Co., 2 S. W. Repr. 746. See also Van Note *v.* Railroad Co., 70 Mo. 641; Turner *v.* Railroad Co., 78 Mo. 578.

Private Crossing—Notice of Approach of Train.—See note, 24 Am. & Eng. R. R. Cas. 381; and, generally, Keefe *v.* Sullivan County R. Co., 23 Ib. 301; Johnson *v.* Louisville, etc., R. Co., 13 Ib. 623; Bennett *v.* Grand Trunk R. Co., Ib. 627.

Signals at Crossings.—See note, 26 Am. & Eng. R. R. Cas. 162; and, generally, Rine *v.* Chicago & A. R. Co., 25 Ib. 545; New York, etc., R. Co. *v.* Randel, 23 Ib. 308; Chicago, etc., R. Co. *v.* Boggs, Ib. 282; Cincinnati, H. & I. R. Co. *v.* Butler, Ib. 262; Williams *v.* Chicago, etc., R. Co., Ib. 274; Texas & P. R. Cas. *v.* Wright, Ib. 304. See also notes, Ib. 249, 268, and 307.

Common Law Duties as to Signals, etc.—There is no common-law duty on the part of a railroad company (irrespective of circumstances in the particular case) to station flagmen or maintain gates at public grade-crossings. Phila. & Reading R. Co. *v.* Killips, 88 Pa. 405; Stubley *v.* London & N. W. R. Co., L. R. 1 Exch. 13. And see cases cited in 2 Wood, Railway Law, 1318, note 4. Where the statute makes it the duty of a railroad company to give signals—as to ring the bell or blow the whistle on a train approaching a crossing—it is negligence *per se* for it not to do so; but otherwise not. 2 Wood, Railway Law, 1319. Failure to blow whistle or ring bell is not negligence *per se*. Kelly *v.* Hannibal & St. J. R. Co., 13 Am. & Eng. R. R. Cas. 638. Aside from statutory or municipal regulation, no rate of speed at which a railroad train may be run is negligence *per se*. Powell *v.* Missouri Pac. R., 8 Am. & Eng. R. R. Cas. 467. When the rate of speed at which a railroad car is run across a street is shown, it is for the jury to say whether, with regard to the safety of the public, that rate was reasonable. Howard *v.* St. Paul, M. & M. R., 19 Am. & Eng. R. R. Cas. 283. And see the notes to this case and Reading R. Co. *v.* Ritchie, 19 Am. & Eng. R. R. Cas. 275, on the point that no rate of speed is negligence *per se*. Although the leading doctrine of the cases of Phila. & Read. R. *v.* Long, 75 Pa. 257, and Pa. R. Co. *v.* Lewis, 79 Pa. 33, may be regarded as overruled by the line of authorities, of

which Cauley *v.* Pittsburg, C. & St. Louis R., 95 Pa. 398, and Moore *v.* Pa. R. Co., 99 Pa. 301, are instances, yet the earlier cases recognize the principle that the rate of speed in relation to the question of negligence is for the jury. Where a traveller is injured in crossing a railway, negligence is not to be presumed against the company. Pa. R. Co. *v.* Goodman, 62 Pa. 329; Button *v.* Hud. Riv. R. Co., 18 N. Y. 248.

Crossing—Evidence of Negligence—What Sufficient to submit to Jury.—See Guggenheim *v.* Lake Shore, etc., R. Co., 22 Am. & Eng. R. R. Cas. 546; Meek *v.* Penna. Co., 13 Ib. 643; Tully *v.* Fitchburg R. Co., 14 Ib. 682; Peoria, etc., R. Co. *v.* Clayberg, 15 Ib. 356; Lake Erie, etc., R. Co. *v.* Zoffinger, Ib. 370; Reading, etc., R. Co. *v.* Ritchie, 19 Ib. 267; East Tenn. *v.* Clark, Ib. 245; Chase *v.* Maine Central R. Co., Ib. 356; Mantel *v.* Chicago, etc., R. Co., Ib. 362.

Defect in Crossing.—See Maltby *v.* Chicago, etc., R. Co., 13 Am. & Eng. R. R. Cas. 606; Louisville, etc., R. Co. *v.* Smith, Ib. 608; Textor *v.* Baltimore, etc., R. Co., Ib. 635; Allen *v.* New Haven & N. Co., 14 Ib. 615; Funston *v.* Chicago, etc., R. Co., Ib. 640; Stewart *v.* Pennsylvania R. Co., Ib. 679; Western, etc., R. Co. *v.* Atlanta, 19 Ib. 233; Omaha, etc., R. Co. *v.* Martin, Ib. 236.

Lookout—Duty of Trainmen at Crossing.—See Barry *v.* N. Y., etc., R. Co., 13 Am. & Eng. R. R. Cas. 615; Johnson *v.* Louisville, etc., R. Co., Ib. 623; Levay *v.* Midland R. Co., 15 Ib. 478; note, 6 Ib. 125; Chicago, B. & Q. R. Co. *v.* Stumps, 55 Ill. 367.

Crossing when View of Track Obstructed.—See note, 23 Am. & Eng. R. R. Cas. 310; Union Pac. R. Co. *v.* Adams, 19 Ib. 376; Young *v.* Detroit, etc., R. Co., Ib. 417; Pence *v.* Chicago, etc., R. Co., Ib. 366; Mantel *v.* Chicago, etc., R. Co., Ib. 362; Baltimore, etc., R. Co. *v.* Hobbs, Ib. 337; Pzolla *v.* Michigan Cent. R. Co., Ib. 334; Penn. R. Co. *v.* State, Ib. 326; Loucks *v.* Chicago, etc., R. Co., Ib. 305; Tyler *v.* N. Y., etc., R. Co., Ib. 296; Ferguson *v.* Wis. Cent. R. Co., Ib. 285.

As the plaintiff approached a railroad crossing he left his horses with the driver about twenty feet from the track, looked up and down, and listened. Buildings obscured the track on each side of the crossing so that he could only see up and down the track a few hundred feet. Seeing or hearing nothing, he walked quickly back to his team, drove upon the track, and was injured by a passing train. *Held*, in an action to recover, that he was not guilty of negligence. It is the duty of a railroad company in the running of its trains to exercise care according to the circumstances; and where the railroad crosses a much-travelled street or highway, the company as well as the public is bound to exercise care reasonably commensurate with the danger. It is also the duty of the company to give some sufficient notice of the train's approach, and to moderate the speed of the train to such rate as, under the circumstances, is reasonably consistent with public safety. The law, however, does not designate the mode in which these precautions against injury on the part of the company are to be exercised, yet the fact that a flagman is not stationed at such a crossing, and that gates are not there maintained, are matters proper to be considered in determining the rate of speed which is reasonably consistent with the public safety. Lehigh Valley R. Co. *v.* Brandtmaier, 5 Central Rept. 144.

Crossing—Negligence Contributory to Injury at.—See Rigeler *v.* Railroad Co. (N. C.), 26 Am. & Eng. R. R. Cas. 386; L. I. R. Co. *v.* Greaney, 24 Ib. 473; note, 478–481; Lesan *v.* Maine C. R. Co., 23 Ib. 245; Isan *v.* Cincinnati, W. & M. R. Co., Ib. 258.

Contributory Negligence.—The deceased was injured by one of defendant's trains. There was evidence tending to prove that the deceased never

looked or listened for an approaching train, but, on the contrary, the testimony clearly proved that if he had paused a moment and looked or listened he would have seen or heard the train. When he got upon the track the engine which struck him was within fifty or one hundred feet of him, and had he then stopped and looked there was nothing to prevent him from seeing it, and if he had listened, without looking, he would have heard it. If he looked he must have seen the train, and determined to take the chances of crossing the track without being struck. *Held*, that he was guilty of such contributory negligence as to preclude a recovery in an action for his death, notwithstanding the train was at the time running at a rate of speed forbidden by an ordinance of the city in which the accident occurred, and also failed to ring its bell. Taylor *v.* Mo. Pacific R. Co., 86 Mo. 457.

Contributory Negligence—Demurrer to Evidence—Damages.—The plaintiff was crossing a street in the city of St. Louis, and was injured by a car which had been detached and was shunted by a locomotive. *Held*, in an action to recover damages, that the evidence of the plaintiff would not warrant a demurrer to the evidence for defendant, on the ground that it showed that plaintiff had failed to look or listen before attempting to cross the track.

Where the evidence of plaintiff, relied on to show that he was guilty of contributory negligence, is vague, ambiguous, and uncertain, and does not clearly or conclusively show such negligence on his part, the case should not be taken from the jury. A verdict for $6500 for personal injuries *held* not excessive in this case. Dain *v.* St. Louis, Iron Mountain & S. R. Co., 86 Mo. 574.

Foot Crossing—Degree of Care Required from Railway.—The plaintiff was injured by a freight car being backed toward a crossing. The evidence tended to show that the place where the injury occurred was extensively and notoriously used by the public for crossing the railroad without any objection on the part of the company, although not a public highway. In an action to recover damages, *held*, that it was for the jury to determine the amount of care and prudence which the company is required to exercise in approaching and crossing the alley. The company, while not absolutely bound to ring a bell or blow a whistle, yet is bound to give such notice and warning as is reasonable and proper under the circumstances of the approaching train, and it is for the jury to determine whether such notice was given.

The ringing of the bell is not sufficient notice of the approach of the train at such a place as a matter of law; but the company is bound to use reasonable and ordinary care so as not to injure those who might be lawfully on its track at that crossing. The jury are to determine the care and precaution, if any, besides ringing the bell, to be taken by the company upon backing its train. Byrne *v.* New York Central & Hudson R. R. Co., 6 Central Rept. 392.

Injury by Running Down a Person Coming from Behind Rear Car.—A train of cars drawn by a dummy had come upon the track and totally obstructed the passage on both crosswalks. The plaintiff was standing near the corner of a street waiting for the train to proceed on its way; and just about the time the train started she left the sidewalk and commenced to cross the street and arrived at where another train was passing at about the time the rear end of the second car was passing over the crossing, so that she left the north flagstone of the crosswalk and stepped to the south one and passed to the rear of the car and went towards the west or down track, and just as she stepped towards it she was struck by the dummy coming from an opposite direction, and which she could not see until she stepped from behind the train moving out. In an action against the company to recover damages for injury caused by negligence, *held*, that stopping its cars so as to wholly obstruct a frequented street, and thereby prevent plaintiff from seeing a train

coming behind such cars until it actually was upon her, was under the circumstances sufficient to require the submission to the jury of the question of negligence of defendant in running or managing its trains.

Whether or not the mother of plaintiff (a child five years of age) was guilty of negligence in permitting the child to be at large is immaterial, if the child herself was guilty of none. The facts that such plaintiff was upon a crowded street, about to cross it, and waited for one train to pass the crosswalk on which she was, and that she passed to the rear of the train for the purpose of crossing and was struck by the other engine, under the circumstances show no negligence on her part.

Where there is not statutory duty of the railroad company to sound a whistle or ring a bell, and it does neither, a charge which leaves it to the jury to say whether under all the circumstances it should have adopted some other precautions in running its train, than those observed, is not erroneous. Cumming *v.* Brooklyn City R. Co., 6 Central Reporter, 894.

Railroad Crossing—Injury to Innocent Passenger.—The plaintiff by invitation left her home, in a small, one-horse covered carriage, for the purpose of going to the town of E. The horse and vehicle had been hired by another, and the plaintiff was a mere passenger by invitation. They passed along the public road in a direction nearly parallel to defendant's railroad. Coming up near a crossing the driver was on the lookout for trains. At a point four or five hundred feet from the crossing he stopped the carriage and looked out behind to see if he could see or hear a train. Just as he had crossed the track a train passed, and while passing the whistle was sounded. This frightened the horse and caused him to back, which occasioned a collision, and the plaintiff was seriously injured. In an action for damages *held* that evidence of failure by defendant to give the regular signals of approach of the train to the crossing, also of the blowing of a whistle on the crossing which frightened plaintiff's horse and caused the disaster, was evidence sufficient to justify the submission of the case to a jury. Where plaintiff is a mere passenger in a carriage by invitation, and an accident happens at a railroad crossing through the negligence of the railroad company's servants, the railroad company cannot plead in defence contributory negligence of the driver of the vehicle, where the plaintiff had no control over either the carriage or the driver. Philadelphia, W. & B. R. Co. *v.* Hogeland, 7 Atlantic Repr. 105.

Six Tracks—Fast Train—Signals—Railroad Crossing—Negligence.—A woman was crossing a railroad of six tracks. She was struck and killed by defendant's locomotive engine. The tracks cross the street upon a curve nearly at right angles. The company afforded protection by neither flagman nor gate, and upon the occasion in question the train came upon the crossing out of time at the speed of thirty miles an hour, sounding neither bell nor whistle. *Held*, that if she saw the locomotive it might be inferred that she was ignorant as to which track it was upon; that by its sudden appearance she was called upon to determine whether she could stand still or go in one direction or the other to get over the tracks; that it could not be said as a matter of law what a prudent person would have done in similar circumstances; that a jury could alone determine what was her duty and how far it was performed, and hence that a compulsory nonsuit ordered in an action to recover damages for her death was error.

Although the bell is not rung nor the whistle sounded on a locomotive approaching a crossing, it is still the duty of one travelling on the street crossed by the railroad to exercise care and diligence to discover whether a train is about to pass; if he fails to do so, or if, seeing the approaching train, he nevertheless undertakes to cross, he is guilty of negligence, and if injured has no just cause of action. It is for the jury to determine whether

a complaining party is within this rule as to contributory negligence, by examining all the circumstances surrounding the transaction. It is, however, the duty of the court to dispose of the case when no facts are in dispute nor any weight of testimony necessary. Sherry *v.* New York Cen. & H. R. R. Co., 6 Central Rept. 357.

When this case was before the court at the general term, Boardman, J., said:

"The plaintiff was nonsuited upon the ground that the negligence of her intestate contributed to her death. The case presents the common question whether an inference can justly be deduced from the facts proved that the deceased was free from contributory negligence. That question has been very clearly discussed by the learned justice at the time when the nonsuit was granted. We think his views of the case are correct, and justified his action.

"It is of little use to discuss the numerous cases cited by counsel. Many of them would indicate by the breadth of the language used that it should have been submitted to the jury. Stackus *v.* N. Y. C. & H. Riv. R. Co., 9 N. Y. 464; Hart *v.* Hud. Riv. Br. Co., 80 N. Y. 622; Massoth *v.* D. & H. C. Co., 64 N. Y. 524, 529, etc. On the other hand, many cases analogous to the present adjudge that only questions of law were presented, and that the most favorable view of the evidence does not show an absence of contributory negligence. Such are Reynolds *v.* New York Central, 58 N. Y. 248; Gordon *v.* Erie R., 45 N. Y. 660; Cummins *v.* City of Syracuse, 100 N. Y. 637; s. c., 3 East. 198; Tolman, Admx., *v.* S., B. & N. Y. R. Co., 98 N. Y. 198; Becht *v.* Corbin, Receiver, 92 N. Y. 658; McGrath *v.* N. Y. C., etc., R. Co., 56 N. Y. 468, and others.

"The deceased did either see this train coming and attempted to cross in front of it, or she neglected to look out for it, although it could have been seen by her for a distance of 400 to 600 feet from the place where she was struck. In either case she was guilty of contributory negligence, which directly led to her death.

"Relying upon the latter class of cases, which seem to us controlling, this judgment must be affirmed."

Negligence—Averment of Injuries.—In consequence of a defective crossing on defendant's road the plantiff was thrown from her sleigh and injured. In an action for injury an allegation that plaintiff by reason thereof has been and is sick, lame, and sore, and unfitted for manual labor, and has suffered great pain of body and mind, was *held* sufficient to admit evidence that the injury caused "nervous prostration," "spinal irritation," and torpidity of the liver. Babcock *v.* St. Paul, M. & M. R. Co., 30 Northwestern Reporter, 449.

Crossing out of Repair.—The defendant undertook and agreed to construct and maintain a crossing for the use of the public as a highway. In constructing the crossing it became necessary to construct a small bridge to span a ditch which ran along the railroad. The defendant made two gates in the fence on each side of its right of way in order that the travellers might pass through thereat. After the crossing and gates were constructed, the travelling public being informed of the provisions made for the public travel began to pass through the gates and over the crossing, until the plaintiff attempted to drive a loaded wagon across the bridge, when it gave way, whereby it became fastened upon the crossing, and one of defendant's trains ran against it and destroyed it. *Held*, that the company was not liable for the injury unless it had notice of such fact, or the defect existed a sufficient length of time to justify the presumption of notice. Where a railroad owes no duty to one to keep a private crossing in repair, he cannot recover for an

injury sustained by his wagon thereon caused by the crossing being out of repair. Mann *v.* Chicago, R. I. & P. R. Co., 84 Mo. 357.

Contributory Negligence—Parent—Child.—The plaintiff was a child four years of age, and was on her way to a neighboring store, having been sent by her parents. She was passing over a crossing where people were accustomed to cross on foot. The driver was charged not only with driving and managing the horses, but also with collecting the fare. While his attention was engaged in collecting fare the child was struck by the horses, run over, and killed. *Held*, that contributory negligence of the parents would not bar recovery by the infant for an injury resulting from the negligence of the driver. Contributory negligence cannot be imputed to a child four years old. Erie City Passenger R. Co. *v.* Schuster (October 1886), 6 Central Rept. 219.

Contributory Negligence of Children.—Children of tender years cannot be guilty of contributory negligence. Kay *v.* Railroad Co., 65 Pa. St. 269, where the child was 19 months old. Other cases were as follows: Child three years old. Masheeck *v.* Railroad Co., 3 Mo. App. 600. See also Duffy *v.* Railroad Co., 2 West. Repr. 200; Dowling *v.* Allen, 5 West. Repr. 372.

Insufficient Help.—See Dunn *v.* Cass Ave., etc., R. Co. (Mo. App.), 3 West. Rep. 424, wherein it was *held* that failure on part of street railway company to keep a conductor on each car in addition to the driver is not negligence *per se*.

Crossings—Obligation to Keep in Repair.—See note, 24 Am. & Eng. R. R Cas. 481; Gulf, C. & S. F. R. Co. *v.* Greenlee, 23 Ib. 322.

An injunction was applied for to prohibit the Delaware, L. & W. R. Co. from using four railroad tracks which they have recently laid across Spring street, in the city of Newark, for the purposes for which they were laid. Spring street at the point in question will be destroyed as a public highway. With the addition of these four tracks the company now have nine within a space of less than 157 feet. This rendered the street very dangerous for crossing. *Held*, that when the charter of a railroad company gives them the right to cross public highways it imposes upon the corporation the duty to construct and keep in repair good and sufficient bridges or passages over or under the railroad, so that travel over the highway shall not be impeded, and to keep it at all times and under all circumstances in a condition fit for safe and convenient use. Nothing short of legislative authority can deprive the public of their right in a highway, and no legislation will be understood to take away public rights unless such purpose be plainly expressed. By the charter of Newark the mayor and common council are given control and supervision of the streets within the city limits, and they are also charged with the duty to keep and maintain them in condition so that they are constantly fit for safe, free, and convenient use by the public The injunction was granted. Newark *v.* Delaware, L. & W. R. Co., 7 Atlantic Rept. 123.

Railroad Crossings—Speed—Violation of Ordinance.—The deceased left his home early in the morning to go to the market, and while crossing defendant's track was struck and killed by a train. The evidence tended to show that the train was being run at 12 miles per hour, without its bell being continually rung, in violation of an ordinance, which defendant had accepted, forbidding it from running within the city limits at a greater speed than 6 miles an hour, and that the deceased was killed instantaneously with his stepping on the track, and the engine was not reversed till after it passed over him. *Held*, that the defendants were guilty of negligence *per se*. The evidence tended to show that it was the daily custom of deceased, about the time the accident occurred, to go to his place of business, pursuing the

customary route; that the morning was dark and foggy; that there were a number of railroad tracks crossing the street on his route and a number of footpaths between and across these tracks used by the public, and no warning was given by the bell. *Held*, that the jury might well have found that deceased was not guilty of contributory negligence. Keim *v.* Union R. & Transit Co., 7 Western Reporter, 144.

For other cases holding that the rate of speed at which the train was running in violation of the ordinance was negligence *per se*, see Karle *v.* Kansas City, etc., R. Co., 55 Mo. 476; Maher *v.* Atlantic, etc., R. Co., 64 Mo. 267; and Bergman *v.* St. Louis, etc., R. Co., 4 West. Rep. 594. See also Johnson *v.* Hudson River R. Co., 20 N. Y. 65; and St. Louis, etc., R. Co. *v.* Dunn, 78 Ill. 197.

Railroad Crossings—Injury at.—The plaintiff was crossing defendant's track with a sleigh loaded with furniture. When the sled crossed the track it struck upon the bare ground and stuck. The horses being upon an icy portion of the highway, when they attempted to pull hard enough to start the load they would slip. A passing train struck the hind end of his load and tore it to pieces. The evidence concerning the accident was conflicting. On motion for a new trial, *held*, that it would not be granted unless the verdict was clearly against the weight of evidence.

It is the duty of the traveller upon a highway to look carefully for approaching trains before attempting to cross a railroad track. It is equally the duty of those in charge of a train of cars to keep a sharp lookout. Purinton *v.* Maine Central R. Co., 9 Eastern Rept. 46.

STATE *ex rel.* HAHN, Atty.-Gen., *v.* MINNESOTA CENT. R. CO.

SAME *v.* HASTINGS AND D. R. CO.

(*Advance Case, Minnesota. December* 22, 1886.)

It is a tacit condition, annexed to or implied in the charter of every private corporation, that the government may resume its corporate franchises for a misuser or non-user thereof.

The statute (Gen. St. Minn. 1878, c. 76, § 11) provides that the suspension of its lawful business by a railroad company for one year shall be a ground of forfeiture "of its privileges and franchises acquired under the laws of this State." But the corporation is not to be deemed dissolved until such forfeiture is judicially ascertained and declared.

Where, in a proceeding by the attorney-general in behalf of the State for the dissolution of a corporation under the statute, the facts clearly bring the case within its terms, it is mandatory upon the court to declare a forfeiture.

The duty of a railroad corporation to maintain and operate its road is a public duty, and the chief end and object of its creation and existence, and the condition and consideration upon which it receives its grants and franchises from the State; and the suspension of such duties is a suspension of its lawful business within the meaning of the statute, and a cause for declaring a forfeiture, though the corporation also possess, and continue to exer-

cise, other franchises, subordinate and secondary to its principal franchises and business, unless such forfeiture is waived, or the right to continue to exist as a corporation after such suspension of its business is sanctioned by the State.

The right to hold exempt from taxation land granted to a railroad corporation in aid of its principal enterprise is a franchise, but ancillary and subordinate; and the right to exercise such franchise, and to continue its corporate existence for such purposes only, cannot lawfully survive after a sale of its railroad, and the abandonment of its principal business as a railroad corporation, unless by the authority of the legislature expressed or clearly implied. The rights of the State are not lost by delay merely, nor can they be waived by its executive officers.

The respondents (railway corporations) were each endowed with land grants in connection with their other chartered privileges, and, after completing the respective railroads authorized by their charters, disposed of and transferred the same to another railway corporation, reserving, however, the granted lands and certain corporate rights to themselves; and since that time, to wit, for several years, such other corporation has claimed to own, and has in fact controlled and operated, the railroads so transferred; and these respondents thereupon altogether ceased to control or operate such roads, and disclaim any interest therein, and have never since transacted any business as railroad corporations, exercising only such franchises as pertained to the land grants held by them. The terms of such transfer, separation, and reservation of franchises were, however, never sanctioned by the legislature. *Held*, in *quo warranto* proceedings in behalf of the State, that, upon the facts disclosed and admitted upon the record, a case is made warranting a judgment of forfeiture, and for a dissolution of both corporations.

BERRY, J., dissenting.

QUO WARRANTO.

W. J. Hahn, Atty.-General, for the State.

VANDERBURGH, J.—Upon the facts admitted on the face of the record, the attorney-general applies for judgment dissolving these corporations, on the ground of non-user of their franchises, and a suspension of their business as railroad companies. The information shows, and the answers admit, that the respondents FACTS. have heretofore sold and conveyed the lines of road authorized by their charter, and by them constructed thereunder, and for more than four years they have neither owned nor operated any railroad in this State. It further appears that they claim still to be corporations exercising certain other franchises, to wit, the right to hold and dispose of lands granted upon the construction of the roads, or designated portions thereof, exempt from all taxation.

The attorney-general insists that the corporations have abandoned the chief purpose and business for which they were organized, and endowed with grants and chartered privileges, and that the suspension of the exercise of their principal franchises amounts to a non-user, for which a forfeiture should be declared. It is common-law rule that a private corporation created by NON-USER FORFEITURE. the legislature may lose its franchises by a misuser or non-user of them, and they may be resumed by the government

under a judgment upon a *quo warranto* to ascertain and enforce the forfeiture. This is a tacit condition annexed to the creation of every such corporation (Terrett *v.* Taylor, 9 Cranch, 51, 52; People *v.* Hudson, 6 Cow. 217); and by Gen. St. 1878, c. 76, § 11, it is provided that, whenever any railroad corporation shall "for one year suspend the lawful business of such corporation, such company or corporation shall be deemed to have forfeited the rights, privileges, and franchises granted by any act of incorporation or acquired under the laws of this State, and shall be adjudged to be dissolved." Rev. St. 1866, c. 76, § 11; Id. c. 79, § 2; Comp. St. 1858, c. 67, § 8.

To this end an information may be filed and prosecuted to judgment; and it was held in State *v.* St. Paul & S. C. R. Co., 28 N. W. Rep. 245, that a forfeiture under section 11, c. 76, just quoted, might be enforced by *quo warranto* in this court. But the general rule is that a corporation is not to be deemed dissolved until a forfeiture is judicially ascertained and adjudged. People *v.* Turnpike Co., 23 Wend. 256; Bradt *v.* Benedict, 17 N. Y. 99; Minnesota Cent. R. Co. *v.* Melvin, 21 Minn. 344; and a cause of forfeiture can only be taken advantage of by the State in a direct proceeding for the purpose. Heard *v.* Talbot, 7 Gray, 120. In a forfeiture for negligence or non-user of corporate privileges at the common law, the court was left to determine whether, under the circumstances of any particular case, the acts and omissions had been such, or had been continued for such length of time, as to warrant a judgment. Harris *v.* Railroad Co., 51 Miss. 605; Hart *v.* Railroad Co., 40 Conn. 524. But the statute referred to expressly provides for a judgment of dissolution of a railroad corporation "which for one year suspends the lawful business of such corporation." This leaves no room for any discretion on the part of the court, where this fact clearly appears, to refuse judgment of forfeiture. The terms of the statute admit of no excuse or explanation. People *v.* Railroad Co., 53 Barb. 123; State *v.* Building Ass'n, 35 Ohio St. 264; Bradt *v.* Benedict, 17 N. Y. 96. The non-user complained of must undoubtedly relate to matters which are of the essence of the contract between the corporation and the State. Com. *v.* Bank, 28 Pa. St. 389; Attorney-General *v.* Railroad Co., 6 Ired. 469; Mor. Corp. § 1025.

QUO WARRANTO TO ENFORCE FORFEITURE.

These railroad corporations were created by the State to maintain, have, use, and operate railroads. This was their lawful business, and the end and object for which they were created, and the consideration and condition upon which they were given their franchises and special privileges, and endowed with land grants. Mor. Corp. (2d Ed.) §§ 1114, 1115. It would seem, therefore, that a suspension of such business by the corporations would neces-

sarily bring the case within the statutes, notwithstanding their reservation of the land grants and franchises upon the sale or transfer by them of the railroads. The right to acquire and dispose of these lands, and the right to hold the same in the mean time exempt from taxation, are corporate franchises, but ancillary and subordinate to the main purpose and object for which the companies were chartered. The failure to discharge their duties to the public, and the non-user or suspension of their principal business as railroad companies, is a sufficient ground for an absolute forfeiture of their corporate rights. Ward *v.* Sea Ins. Co., 7 Paige, 296; *In re* Jackson Ins. Co., 4 Sandf. Ch. 562; Mickles *v.* Bank, 11 Paige, 126; Attorney-General *v.* Railroad Co., 6 Ired. 469; Heard *v.* Talbot, 7 Gray, 120. SUSPENSION OF BUSINESS.

By the consent of the State such subordinate franchises may exist and continue to be exercised, independently of the franchises to construct and operate railroads. State *v.* St. Paul & S. C. R. Co., 28 N. W. Rep. 247. But the right to exercise such franchises cannot lawfully survive after a sale of the railroads, and a suspension by the corporations of their principal business, unless by the authority and consent of the State, expressed or clearly implied; and the consent, ratification, or waiver must be through legislative enactments. The State is not, in such case, bound by the acts of its executive officers. People *v.* Phœnix Bank, 24 Wend. 431; People *v.* Plank-road Co., 27 Barb. 458; Ang. & A. Corp. § 777; People *v.* Kingston Turnpike Co., 23 Wend. 212. It is admitted that, in the transfer of the railroads in question, the lands were separated and reserved to the respondents, and the grant and conveyance limited to the railroads, and the property appurtenant thereto, and that a portion of the granted lands still remain undisposed of by them. CONTINUANCE OF FRANCHISES BY CONSENT.

The discussion in these cases is therefore narrowed down to the question whether the legislature has authorized or consented to such a separation of corporate franchises and the continued existence of the corporations for the purpose of holding and disposing of the granted lands, notwithstanding they had ceased to hold or operate any railroads, or has waived the forfeiture resulting from the suspension by them of their lawful business as railroad companies. The contention of the respondents is that such waiver appears from special acts, and the course of legislation on the subject.

1. In respect to the case of the Minnesota Central R. Co. The proportion of the land grant falling to the Minneapolis & Cedar Valley R. Co. in aid of the construction of the line finally built by the respondent the former company was authorized to take, under the act of May 22, 1857, which provided that the company should be capable in law of taking and holding such lands in fee-simple, and that said lands so granted should be exempt from WAIVER.

taxation until the same should be sold and conveyed. After the foreclosure by the State, all the franchises, rights, and property theretofore belonging to the Minnesota & Cedar Valley R. Co. were transferred by the legislature to the respondent, and the lands set apart for that line of road were authorized to be conveyed to the respondent upon the construction thereof, as provided in the Special Laws of 1864, c. 2; and it was also therein provided that the lands so granted should be exempt from taxation until conveyed or contracted to be sold by the company. Minnesota Cent. R. Co. *v.* Melvin, 21 Minn. 340. The respondent thereafter, in pursuance of its charter as amended, completed the construction of the road to Austin, in the county of Mower, about the year 1866, and was thereupon entitled to a conveyance of the land grant appurtenant to so much of that line of road. The McGregor & Western R. Co. was in the mean time engaged in constructing a railroad from McGregor, in the State of Iowa, to Austin, in this State, at which point it was authorized to make a connection with the Minnesota Central R., by the act of February 24, 1866. And by the act of March 7, 1867, the same company was authorized to extend its line of road by way of Austin to Owatonna, and by section 3 of the act of 1866, just referred to, it was provided that, upon filing a copy of its articles of incorporation in the office of the secretary of State, that company should be vested with the powers of a domestic corporation, and thereafter become authorized, under the general provisions of section 39, c. 34, Gen. St. 1866, to purchase the road of the respondent, or any portion thereof, being a "line continuous with its own."

It is admitted that its articles of incorporation were duly filed in pursuance of the act of 1866, and the purchase of a part of respondent's road was therefore consummated in 1867, under which the latter sold and conveyed its line of railroad from Minneapolis to Austin, saving and reserving, however, in the conveyance, its right to the lands and its right to be a corporation. Soon after, the McGregor & Western Co. transferred its purchase to the Milwaukee & St. Paul R. Co. It may be conceded, therefore, that the McGregor & Western Co., by virtue of the general provisions of the statute referred to, was authorized to acquire that portion of respondent's road; and the validity of the subsequent transfer thereof to the Milwaukee & St. Paul Co., which is not disputed, is not a proper subject of inquiry in this proceeding. The respondent afterwards completed the remaining portion of its road from Austin to the State line, which was thereafter, in 1870, also transferred, in like manner, to the Milwaukee & St. Paul R. Co., since which time the respondent has not operated any portion of its railroad, but has continued to hold and enjoy the franchise pertaining to the lands acquired by it in aid of the construction of the road, a limited amount of which still remains undisposed of.

By the act of February 29, 1868, the legislature expressly authorized "the governor to certify to the secretary of the interior the construction and completion of that part of the Minnesota Central R. Co. from Minneapolis to Austin, and to execute, in the name of the State of Minnesota, under the great seal thereof, a deed in fee-simple to said company of so many and of such portions of the lands appertaining to the completed portion of said road as the State is entitled to; and, whenever the Congress of the United States shall authorize the conveyance or appropriation of the residue of the lands granted to said State to aid in the construction of said roads, the governor shall execute to said company a deed in fee-simple of the remainder of such lands." And by the same act the legislature extended the time for the completion of that portion of the original line from Austin to the State line for the term of two years. This action of the legislature was with knowledge of the previous sale to the McGregor & Western R. Co. of the line previously built. This act was, of course, a waiver of any forfeiture for any past misuser or non-user of corporate franchises up to that time, and an express recognition of the corporate existence and authority to complete the road, and continue in the exercise of its franchises as a railroad company. What effect its transfer of the balance of the road, by it constructed to the State line, and the subsequent total suspension of its business as a railway company, may have upon its right to continue its corporate existence for the purpose of holding and disposing of the granted lands, we will discuss later in this opinion.

2. In respect to the Hastings & Dakota R. Co. We find no legislative authority or sanction for the suspension by the respondent of its franchises, business, and duties as a railroad company, and the continued, separate, and independent exercise of the business of the land company for the disposition of the land grant acquired by the corporation. When the respondent had constructed that portion of its road east of Glencoe, it sold and conveyed the same to the Milwaukee & St. Paul R. Co., with its rolling-stock, equipment, etc., appertaining to that portion of its road, and thereafter wholly ceased to operate the same, but reserved all the lands earned by and granted to the respondent, under its charter, for the construction thereof, and also its corporate franchise; and afterwards, upon the completion of its line to Big Stone Lake, it in like manner sold and transferred the remaining portion thereof, with like reservations, to the same grantee, which has ever since continued to maintain and operate the entire line. The respondent also constructed an independent branch road from Minneapolis to Benton, in the county of Carver, which it also transferred to the Milwaukee road in the year 1882, since which time the respondent has operated no

HASTINGS & DAKOTA R. CO.—SUSPENSION—CONSENT.

railway whatever, and has wholly suspended the exercise of its franchises as a railway company; but claims still to be a corporation, entitled to exercise its franchises, to hold and dispose of its granted lands exempt from taxation.

The charter, and amendments thereto, secured to respondent the benefit of the lands granted by Congress to aid in the construction of the main line, referred to, from Hastings to the west line of the State; and these lands were to be transferred to the company "as soon and as often as 10 miles of said road shall be constructed and completed; and the grant shall not become void, nor the company be dissolved, by the non-completion of the entire extent of said road, but shall be good and valid, to all intents and purposes, for the parts or portions of said road completed, and the said company shall continue and survive to that extent." Sp. Laws 1866, c. 12, § 15; Sp. Laws 1867, c. 9, § 4. Undoubtedly the company acquired an absolute right to the lands actually earned as the construction of the road progressed; but these provisions involve no recognition or sanction by the State of its right to suspend its active exercise of the franchises of a railway company as to the completed roads, or otherwise. The provisions relating to taxation, and under which the exemption is claimed (Sp. Laws 1867, c. 11, § 19), are, substantially, that the percentage upon the gross earnings therein required to be paid to the State should "be in full of all taxation and assessment whatever;" "and, for securing to the State the payment of the aforesaid percentum, it is hereby declared that the State shall have a lien upon the railroad, and upon all the property, estate, and effects of said company, whether real, personal, or mixed." These provisions relate wholly to the obligations and duties of the respondent; and the granted lands are a part of the company's property for which a peculiar mode of taxation is thus provided, and are a part of the corporate property upon which a lien is thus secured to the State. The charter, clearly, does not contemplate that the title or ownership of these lands should be severed from the proprietorship of the road, or any division of the franchises of the company; and we find nothing in any subsequent legislation sanctioning the sale to and operation of the railroad by another company, and the survival of the respondent as a separate organization, entitled to exercise the separate franchise of holding and disposing of its lands; and we are unable to see how any such arrangement could be valid without the sanction of the legislature. State *v.* St. Paul & S. C. R. Co., 28 N. W. Rep. 247. The right to assign corporate franchises is itself a franchise, and must be the subject of legislative grant.

The counsel for respondent, however, rely upon subsequent acts of the legislature, extending the time for the completion of the unsold portion of the line, as evidence of the legislative sanction

and approval of the past acts of the company. But until the forfeiture was adjudged, the company might exercise its franchises, and proceed with the construction of the road within the time fixed by the legislature; and it will be borne in mind that the gravamen of the charge here is not misuser, but non-user,—a suspension of its business as a railroad company by the respondent. The time limited for such purpose having expired, an act was passed February 28, 1876, extending the time for the completion of the road by the respondent. Undoubtedly this was so far a recognition of the continued existence of the company as a railway corporation. But the object of the statute clearly appears from the preamble, which recites the default of the company "in failing to construct the railroad according to the terms and conditions of the several acts of the legislature granting to said railroad company the right to construct said line of railroad, and granting to said company lands to aid in such construction;" reciting also the importance of an early completion of the road, and the expressed willingness of the company to complete and put it in operation within a reasonable time.

Stress is also laid upon the fact that in the acts of 1876, 1877, and 1878, referred to in the answer, which also still further extended the time for the construction of the road, clauses are inserted requiring the company, "its successors or assigns," to carry freight and passengers at reasonable rates. Sp. Laws 1876, c. 115, § 3; Sp. Laws 1877, c. 218, § 4; Sp. Laws 1878, c. 234, § 4. This was intended as a regulation, significant of the policy of the State, to be permanently ingrafted on the charter, into whosesoever hands it might fall; but it conferred no new franchises or rights upon this corporation, and it cannot be invoked as legislative authority or sanction for the subsequent transfers, suspension of business, and continued existence as a corporation by the respondent. And this is the more evident from the fact that, in each of these acts, provisions for an absolute forfeiture without judicial decree in case of default, and for a redisposition of the franchises and road, were inserted.

The Milwaukee & St. Paul R. Co. was then a foreign corporation, which had no right, under the laws of this State, to purchase or take an assignment of respondent's railroad and franchises. It was not so authorized by Gen. St. 1866, c. 34, § 39 (Gen. St. 1878, c. 34, § 69), because that applies to domestic corporations only, or corporations clothed with like powers by the State. And the rights and privileges conferred on that corporation by chapter 93, Sp. Laws 1872, were expressly, by that act, limited to the line of the Chicago & St. Paul R. Co., the sale of which was confirmed. Such authority was for the first time conferred, in so far as we are able to find, by chapter 221, Sp. Laws 1881, referred to in the

answer. Nevertheless, it appears that the respondent, having then completed the main line of its road to the west boundary of the State, thereupon, in January, 1880, as before stated, sold the division west of Glencoe to the Milwaukee & St. Paul R., reserving its land grant, and right to be a corporation. No subsequent action of the legislature is relied on showing any ratification of such transfer or waiver by the State. Subsequently, in 1882, the branch from Minneapolis to Benton was sold to the same company without reservation, as we presume there was no land grant connected with it, and since that time the respondent has suspended its lawful business as a railway corporation. It was not material that the last sale was authorized by the act of 1881. It saved to the respondent no right to continue its corporate existence. State *v.* St. Paul & S. C. R. Co., *supra*. And, surely, the previous voluntary arrangement entered into between these corporations in respect to the construction and conveyance of the railroad and its appurtenances, and the reservation to respondent of the corporate franchises and lands as alleged, can be no sufficient answer to the charge in this information. The charter never contemplated such a division of the corporate franchises, and it has never been authorized or sanctioned by the legislature. No purpose connected with the object of the respondent's organization, or its proper business as a railway corporation, is any longer served by its continued existence. The case is entirely different from that of the sale of the St. Paul & Sioux City R. Co., where the legislature, in a special act, authorized the transfer, and, *ex industria*, provided that the right to continue to exercise its corporate franchises should be saved to the corporation. State *v.* St. Paul & S. C. R. Co., *supra*.

3. From the foregoing it is apparent that the transfer of the section of its road from Austin to the State line, and the entire suspension of its lawful business and functions as a railway corporation by the respondent, the Minnesota Central R. Co., were equally without such legislative sanction as to bar these proceedings. It was the closing out and cessation of its railroad business, and was so intended to be. It is no answer or excuse that the Milwaukee Company has continued to operate the roads, and has paid the taxes required by the charters of these respondents. It cannot and does not, we presume, claim to be operating them under such charters. These facts do not affect the question of the suspension of corporate duties by respondents. Lake Ontario R. *v.* Curtiss, 80 N. Y. 224; People *v.* Northern R., 53 Barb. 123; Com. *v.* Turnpike Co., 5 Cush. 509.

In Conro *v.* Port Henry Iron Co., 12 Barb. 63, the defendant corporation leased its works for the term of two and one half years for the purpose of closing out its business, but the business was

carried on as before the lease, and the court held, per Willard, J., that, conceding the lease to be binding on the company, it suspended for two years and six months its ordinary and lawful business, and was an act of self-destruction. See People *v.* Hudson Bank, 6 Cow. 219, 220; State *v.* Commercial Bank, 13 Smedes & M. 569; State *v.* Rives, 5 Ired. 309; Mor. Corp. 1115; State *v.* Railroad Co., 29 Conn. 547.

Nor is it material that the records of the executive department of the State disclose the fact that the Milwaukee Company claim to own, and have in fact operated, these roads as a part of its system, or that the legislature, having notice of these records, have omitted to take action in the premises. The Milwaukee Company has paid its own taxes on its gross earnings, and has discharged its own public duties; and in the mean time the respondents have paid no taxes, nor discharged any duties to the public. The remedies of the State, under the statute, have continued to exist, and have not been suspended by the legislature. No further legislation was needed to secure its rights, and the absence of it is no waiver, and the respondents have suffered no prejudice from the leniency of the State.

The fact that authority is given by section 2 of chapter 93, Sp. Laws 1872, before referred to, authorizing the Milwaukee & St. Paul Company "to make a continuous connection, through the city of St. Paul, with its present line of railway in Dakota and Hennepin counties heretofore belonging to the Minnesota Central R. Co.," even if construed to be a recognition of the title of that company to the whole line of the last-named company, is immaterial upon the question here under consideration. It is evident that the legislative mind was not directed to the *status* of the Central R. Co., or the terms and conditions of its last transfer to the Milwaukee Company, and it involves no waiver of its right to proceed against the former company on account of a suspension of its functions as a railway corporation. It is admitted that, as between the parties at least, these roads have both been transferred to the Chicago, Milwaukee & St. Paul R., which has for years controlled and operated the same, and is at present, since the act of 1881, recognized as a domestic corporation, and these respondents have in fact, as corporations, retired from the management or operation of any railroads, and disclaim any ownership or interest therein. The rights of the grantees are not in issue here, and may never be questioned. The reference to the acts of the legislature on the subject is made for the purpose of showing that there has been no legislation limiting or waiving the effect or operation of chapter 76, § 11, under which the proceeding is brought so as to warrant the court in disregarding or holding the provisions of that section inapplicable to these respondents. Whether, if

the information proceeded upon common-law grounds, the court would be warranted in applying the rule less strictly, in view of the facts and circumstances of this case, we need not determine. In Bradt *v.* Benedict, *supra*, Selden, J., referring to a similar statute in New York, treating it as supplementary to the common law, says: "The statute goes much further, and provides that a mere suspension of the ordinary business of the corporation shall operate as a surrender.

Without attempting a discussion in general as to what acts or conduct may or may not amount to a suspension of the lawful business of a railroad company further than is applicable to the cases before us, we see no escape from the conclusion that, upon the record presented, the State is entitled to judgment of forfeiture, as asked in the information in each of these cases, and it is accordingly so ordered.

BERRY, J. (dissenting).—I understand my brethren to hold that the sale of that part (branch) of the Hastings & Dakota road lying between Minneapolis and Benton Junction was authorized by the act of 1881. This appears to me to be the fact; but, as no part of the land grant appertained to this branch, it is not very important in this case, except as going to show that the sale and consequent non-user of the branch, being authorized by law, neither would furnish any ground for forfeiting any franchises of the Hastings & Dakota Co., or, at most, none except such as that sale would deprive the company of power and right to use.

I dissent generally from the conclusions arrived at by my brethren as respects the rest of the Hastings and Dakota road, being that part of it which lies between Hastings and Ortonville. As to this, I think its non-user by the Hastings & Dakota Co. in person (if I may use that phrase), and its maintenance and operation by the Chicago, Milwaukee & St. Paul Co., have been acquiesced in, assented to, and sanctioned by both the legislative and executive departments of the State government, from time to time, ever since the construction of its different portions, respectively, being from four to fifteen years last past.

As to that part of the Minnesota Central road lying between Minneapolis and Austin, I understand my brethren to agree, as I do, that the sale to the McGregor Western was expressly authorized by various acts of the legislature; so that, as in the case of the Hastings & Dakota Branch, I see no reason why such sale, or the consequent non-user by the Minnesota Central, should at most furnish any ground for forfeiting any franchise of the latter company except such as that sale would deprive it of power and right to use; and, as to this part of the Minnesota Central, there has been a like acquiescence, assent, and sanction as in the case of the

Hastings & Dakota, and even more explicit as respects the sale, the non-user by the Central, and the maintenance and operation by the Chicago, Milwaukee & St. Paul, for nearly twenty years, and as to the ten or twelve miles lying between Austin and the State line, for more than fifteen years.

In my judgment this conduct on the part of the State waives any right which it might have had to demand a forfeiture of the entire franchises of these companies on account of the alleged sales and non-user of the roads. If the sales are invalid and abortive, so that the roads are still owned and held by the Hastings & Dakota and Minnesota Central Cos., respectively, it is not perceived why such sales, or the merely personal non-user of the roads by these companies, should call for such forfeiture, so long as the non-user has been acquiesced in, assented to, and sanctioned by the State. But conceding that the sales are valid and operative, so that there is not only a non-user by the Hastings & Dakota and the Minnesota Central Cos. of what may for brevity be called their railroad franchises, and that, as they have no further use for them, and nothing for which they can use them, they may as well be forfeited, I can conceive of no reason why, in view of the State's acquiescence, assent, and sanction, before mentioned, these companies should be deprived of the franchise to hold and sell their lands upon the terms, as to taxation and otherwise, upon which they were granted to them; or why, for this purpose, they should not be permitted to retain the franchise of corporate existence, leaving the State, on the other hand, to enjoy the right to the commutation of taxes now secured by constitutional amendment.

With respect to the statute relied on as requiring a forfeiture when a corporation has suspended its lawful business, I have only to say that it cannot have reference (so as to require an entire forfeiture) to a case in which the suspension is partial, and sanctioned by the State. For these reasons I dissent from the conclusion reached in the majority opinion.

I content myself with briefly stating the general results which I have arrived at in the case, because a full and detailed statement of the facts, and grounds upon which I stand, would render this (which is only a dissenting) opinion unjustifiably voluminous. A full presentation of the facts will be found in the pleadings, and in the briefs of counsel.

Dissolution of Corporations.—See, generally, Shenandoah V. R. Co. *v.* Griffith, 13 Am. & Eng. R. R. Cas. 12; Rogersville, etc., R. Co. *v.* Kyle, 14 Id. 576; Lafayette Co. *v.* Neely, 17 Id. 242; Bigelow *v.* Union Freight R. Co., 20 Id. 425; Marshall *v.* Western N. C. R. Co., 20 Id. 578; Great Cent. R. Co. *v.* Gulf, etc., R. Co., 26 Id. 114.

Forfeiture of Charter—Generally.—Forfeiture of charter cannot be enforced collaterally, the State not having acted. Ashville Division *v.* Aston,

92 N. C. 578; Atlanta *v.* Gate City Gas-Light Co., 71 Ga. 106; Barren Creek Ditching Co. *v.* Beck, 99 Ind. 247; Logan *v.* Vernon, G., etc., R. Co., 90 Ind. 552; Toledo & A. A. R. Co. *v.* Johnson, 49 Mich. 188.

The State alone can enforce a forfeiture. State *v.* Butler, 15 Lea (Tenn.), 104; Green *v.* St. Albans Trust Co., 57 Vt. 340; Moore *v.* Schoppert, 22 West Va. 282.

The State may waive its right to enforce a forfeiture, as by recognizing the continued existence of the corporation, notwithstanding the act of forfeiture. People *v.* Ottawa Hydraulic Co., 115 Ill. 281.

A private citizen cannot prove a mere non-user of a franchise in order to make out a forfeiture. Western Penna. R. Co.'s Appeal, 104 Pa. St. 399.

A lessee of part of a railroad company's road is a proper party to an action to vacate its charter. People *v.* Albany & Vermont R. Co., 77 N. Y. 232.

In Louisiana a creditor of a corporation suing to forfeit its charter on the ground of insolvency must, before he can demand the provisional appointment of a receiver, prove the corporation subject, under the statute, to that method of forced liquidation. Bothick *v.* Society, etc., 31 La. Ann. 63. See also State *v.* Fifth District Judge, 31 La. Ann. 823. In some cases, although the corporation has abused its powers, forfeiture is discretionary with the court. State *v.* Oberlin Build. & L. Assn., 35 Ohio St. 258.

But while it is the right of the State to enforce a forfeiture, it seems that the fact that a corporation has by non-performance of a condition of its charter forfeited its corporate rights and powers may be asserted by any one whose land or property is sought to be appropriated in answer to the application therefor. *Re* Brooklyn, etc., R. Co., 72 N. Y. 245. And in Pennsylvania, while corporate franchises cannot be declared lapsed by decree in equity, a corporation claiming to have a franchise will be enjoined from invading individual rights. Leejee *v.* Continental Pass. R. Co., 10 Phila. 362.

The attorney-general is a necessary party to a bill to have the franchises of a company forfeited. State *v.* White's Creek Turnpike Co., 3 Tenn. Ch. 163. And *mandamus* lies to compel him to institute suit to forfeit a charter in a proper case. State *v.* Atty.-General, 30 La. Ann. Part II. 954.

What is a Forfeiture of Charter by Non- or Mis-user.—There are many decisions upon this subject. A banking corporation which fails within a year to pay up its entire capital stock in cash forfeits its charter under the Colorado statute. People *v.* City Bank, 7 Colo. 226. In State *v.* Council Bluffs & N. F. Co., 11 Nebraska, 354. Repeated and wilful acts of misuser or non-user by a corporation, which are of the essence of the contract between it and the State, constitute just ground for forfeiting the franchises.

An information in the nature of a *quo warranto* showing that the principal office of the defendant company is in New York, that its books and records have always been kept in that city, that none of its principal officers reside in the State, and that by reason of these facts it is impossible to enforce an attachment of shares of its stock in New York, *held*, on demurrer, to show sufficient grounds of forfeiture of its charter at common law and under the statute. State *v.* Milwaukee, L. S. & W. R. Co., 45 Wis. 579.

An agreement made by one of the trustees of a corporation that if A would obtain an appropriation for it from the legislature he should receive whatever amount might be appropriated over a certain sum, was subsequently ratified by the board of trustees, who were cognizant of the agreement, by the appropriation of the excess over the sum named to A, who was accordingly paid that amount by the trustees' direction. *Held*, sufficient cause for a dissolution. People *v.* Dispensary & Hospital, 7 Lans. (N. Y.) 305.

What is not a Forfeiture of Charter.—An incorporated turnpike company in good faith attempted to consolidate with another one. Twelve

years afterward the consolidation was declared void. The company then resumed possession of its property, and for a year continued to exercise its franchises. *Held*, that it should not be deemed to have forfeited them. State *v.* Crawfordsville, etc., T. Co., 102 Ind. 283.

Corporations regularly chartered by the legislature under the Georgia constitution of 1868 did not become extinct by a failure to organize and act before that of 1877. The law does not so declare. Atlanta *v.* Gate City Gas Light Co., 71 Ga. 106.

The fact that trustees of a mutual benefit society voted themselves back pay and issued illegal certificates of membership is not sufficient ground of forfeiture. State *v.* People's Mut. Benefit Asso., 42 Ohio St. 579.

Indiana Rev. St. 1881, § 3641, providing that gravel-road companies shall cease to be bodies corporate "if, within two years from the time of filing a copy of its articles of association with the county recorder, it shall not have commenced the construction of its road, and . . . if within four years from such time such road shall not be completed," *held* not to apply to a company formed to own a road previously built. State *v.* St. Paul & M. T. Co., 92 Ind. 42.

Insolvency does not *ipso facto* work a forfeiture. Moran *v.* Lydecker, 27 Hun, 582.

Failure to improve streams or to keep them in order will not forfeit the charter of a navigation company. Pixley *v.* Roanoke Navigation Co., 75 Va. 320. In People *v.* Kankakee River Improvement Co., 103 Ill. 491, *quo warranto* was brought against a river improvement company and a forfeiture of its franchise sought. By its charter the corporation was required to file certain accounts annually. It failed to do so. It appeared that the filing of the accounts was required because the State had reserved the right to purchase the improvements to be made, and that, as by subsequent legislation, the State had relinquished its right of purchase, the reason for requiring the accounts no longer existed; but one of the requirements of the charter being that the company should, within eight years, lock and slack water the river between certain points, and this having been done only for a part of the distance, and it appearing that it was not contemplated to complete the improvement, judgment of forfeiture should be rendered. The contention of the corporation that a forfeiture should be enforced only against part of the improvement was not sustained, the franchise being an entire one.

The corporation act of Oregon, 16 Or. Laws, p. 528, declares that if any corporation shall neglect and cease to carry on its business for six months, its corporate powers shall cease. *Held*, that such lapse of time did not operate *ipso facto* as a forfeiture, but was only a cause of forfeiture of which the State could avail. Wallamet Falls, etc., Co. *v.* Kittridge, 5 Saw. 44.

Failure to organize is not such a non-user as will warrant a *quo warranto* to vacate the charter. State *v.* Simonton, 78 N. C. 57.

Sale of its property and cessation of active business is not *per se* a dissolution. Kansas City Hotel Co. *v.* Sauer, 65 Mo. 279. Neither is neglect to choose officers: the old officers hold over. St. Louis Domicile, etc., *v.* Augustin, 2 Mo. App. 123. See also Baptist Meeting-House *v.* Webb, 66 Me. 398; Harris *v.* Mississippi Valley, etc., R. Co., 51 Miss. 602; DeCamp *v.* Alward, 52 Ind. 468; Allen *v.* New Jersey South. R. Co., 49 How. Pr. 14.

The use of an abbreviation of its corporate name by a corporation is not ground for forfeiture. People *v.* Bogart, 45 Cal. 73.

The fact that a single person becomes owner of all its stock does not forfeit a company's charter. Newton, etc., Co. *v.* White, 42 Ga.

Where the statute makes a mortgage sale of a corporation's property a cause of forfeiture, only a valid sale will have this effect. An illegal sale does

not work a dissolution. White Mountains R. *v.* White Mountains R., 50 N. H. 50.

The following have been held not to be sufficient grounds for forfeiture or dissolution:

Failure in the charter of a corporation to describe its place of business as the "principal place of business." *Re* Spring Valley, etc., Wks., 17 Cal. 132.

Mortgage sale of its property. Smith *v.* Gower, 2 Duv. (Ky.) 17.

Non-payment of $5 at time of subscription on each share taken. Commonwealth *v.* Westchester R. Co., 3 Grant Cas. (Pa.) 200.

Non-user of corporate powers. Rollins *v.* Clay, 33 Me. 132; Slee *v.* Bloom, 19 Johns. (N. Y.) 456; Atty.-Genl. *v.* Bk. of Niagara, Hopk. (N. Y.) 354; Russell *v.* McClellan, 14 Pick. (Mass.) 63.

Disposal of all corporate property. State Bank of Maryland, 6 Gill & J. (Md.) 205; New Jersey Zinc Co. *v.* Boston Franklinite Co., 13 N. J. Eq. 322; Barclay *v.* Tallman, 4 Edw. (N. Y.) 123; Russell *v.* McLellan, 14 Pick. 63; Brinkerhoff *v.* Brown, 7 Johns. Ch. (N. Y.) 217. But see Briggs *v.* Penniman, 8 Com. (N. Y.) 387.

Loss of members. State *v.* Trustees, 5 Ind. 77. Compare case of United Daughters of Cornish, 35 Pa. St. 80.

Omission to elect officers. Baker *v.* Backus, 32 Ill. 79; Cahill *v.* Kalamazoo Mut. Ins. Co., 2 Dougl. (Mich.) 124; Knowlton *v.* Ackley, 8 Cush. 93; Smith *v.* Natchez Stmbt. Co., 2 Miss. 479.

Resignation of officers. Muscatine Turnverein *v.* Funck., 18 Iowa, 469; Hoboken, etc., Assoc. *v.* Martin, 13 N. J. Eq. 427; Slee *v.* Bloom, 5 Johns. Ch. (N. Y.) 366; Phillips *v.* Wickham, 1 Paige (N. Y.), 590; Rose *v.* Turnp. Co., 3 Watts (Pa.), 46; Commonwealth *v.* Mullen, 13 Pa. St. 133; Evarts *v.* Killingworth Mfg. Co., 20 Conn. 447; Boston Glass Mfg. Co. *v.* Langdon, 24 Pick. 49. But see State *v.* Commercial Bank, 33 Miss. 474.

Ceasing to do business from April, 1841, to February, 1852; disposing of their personal property; and neglecting to choose corporate officers in that time. Brandon Iron Co. *v.* Gleason, 24 Vt. 228.

Insolvency. State *v.* Baily, 16 Ind. 46; Hoyt *v.* Sheldon, 3 Bosw. (N. Y.) 267.

Failure of a bank to pay a debt on demand. Case of Mechanics' Bank, 5 Abb. Pr. (N. Y.) 374; Livingston *v.* Bank of New York, 26 Barb. 304.

Failure to give bond to complete bridge. Enfield Toll Bridge *v.* Conn. River Co., 7 Conn. 58.

Neglect of a corporate duty for which a specific penalty is imposed by the charter. Commonwealth *v.* Reed, 4 Pick. 460.

Failure to keep list of stockholders and their holdings, and to publish report of condition. Baker *v.* Backus, 32 Ill. 79.

BUTTZ

v.

NORTHERN PACIFIC RAILROAD.

(119 *United States*, 55.)

The grant by the act of Congress of July 2, 1864, to the Northern Pacific Railroad Co., of lands to which the Indian title had not been extinguished, operated to convey the fee to the company, subject to the right of occupancy by the Indians.

The manner, time, and conditions of extinguishing such right of occupancy were exclusively matters for the consideration of the government, and could not be interfered with nor put in contest by private parties.

The agreement of the Sisseton and Wahpeton bands of Dakota or Sioux Indians for the relinquishment of their title was accepted on the part of the United States when it was approved by the Secretary of the Interior, on the 19th of June, 1873. That agreement stipulating to be binding from its date, May 19, 1873, and the Indians having retired from the lands to their reservations, the relinquishment of their title, so far as the United States are concerned, held to have then taken place.

Upon the definite location of the line of the railroad, on the 26th of May, 1873, the right of the company, freed from any incumbrance of the Indian title, immediately attached to the alternate sections; and no pre-emptive right could be initiated to the land, so long as the Indian title was unextinguished.

When the general route of the road provided for in section six of the act of July 2, 1864, was fixed, and information thereof was given to the Land Department by the filing of a map thereof with the Secretary of the Interior, the statute withdrew from sale or pre-emption the odd sections to the extent of forty miles on each side thereof; and, by way of precautionary notice to the public, an executive withdrawal was a wise exercise of authority.

The general route may be considered as fixed, when its general course and direction are determined, after an actual examination of the country or from a knowledge of it, and it is designated by a line on a map, showing the general features of the adjacent country and the places through or by which it will pass.

That part of section three of said act, which excepts from the grant lands reserved, sold, granted, or otherwise appropriated, and to which a pre-emption and other rights and claims have not attached, when a map of definite location has been filed, does not include the Indian right of occupancy within such "other rights and claims;" nor does it include pre-emptions where the sixth section declares that the land shall not be subject to pre-emption.

APPEAL from supreme court, Territory of Dakota.

The following is the case as stated by the court:

This was an action for the possession of a tract of land in the Territory of Dakota. The plaintiff below, the Northern Pacific R. Co., asserted title to the premises under a grant made by the act of Congress of July 2, 1864. The defendant, Peronto, asserted a right to pre-empt the premises by virtue of his settlement upon

them under the pre-emption law of September 4th, 1841, and that his right thereto was superior to that of the railroad company.

The action was brought into the district court of the Territory. The complaint was in the usual form in such cases, alleging the incorporation of the plaintiff, its ownership in fee of the premises (which are described), and its right to their immediate possession, and that they are withheld by the defendant, with a prayer for judgment for their possession, and damages for the withholding.

The answer of the defendant admits the incorporation of the plaintiff, and that he is in possession of the premises, but denies the other allegations of the complaint. It then sets up as a further defence that he settled upon the premises on October 5th, 1871, and resided thereon, and the several steps taken by him to perfect a right of pre-emption to them, and that he possessed the qualifications of a pre-emptor under the laws of the United States. It concludes with a prayer that the title of the plaintiff be declared void, and that the plaintiff be enjoined from enforcing or attempting to enforce it; that the title be declared to be in the defendant; and that such other and further relief be granted as may be necessary to protect and preserve his rights.

The plaintiff replied, traversing the allegations of the answer; and the issues, by consent of the parties, were tried by the court, without a jury. The court found for the plaintiff, and gave judgment in its favor for the possession of the premises, with costs. On appeal to the supreme court of the Territory, the judgment was affirmed, and, by appeal from the latter judgment, the case was brought to this court. Since it was docketed here, the defendant, who was the appellant, died, and, by leave of the court, his executor, the devisee of his estate, has been substituted as appellant in his place.

The act of Congress of July 2d, 1864, is entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the northern route." 13 Stat. 365.

By the first section, the Northern Pacific R. Co. was incorporated and authorized to equip and maintain the railroad and telegraph line mentioned, and was vested with all the powers and privileges necessary to carry into effect the purposes of the act.

By the third section, a grant of land was made to the company. Its language is: "That there be, and hereby is, granted to the Northern Pacific R. Co., its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty

alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office."

By the sixth section it was enacted "that the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre when offered for sale."

At the time this act was passed, the land in controversy, and other lands covered by the grant, were in the occupation of the Sisseton and Wahpeton bands of Dakota or Sioux Indians; and the second section provided that the United States should extinguish, as rapidly as might be consistent with public policy and the welfare of the Indians, their title to all lands "falling under the operation of this act and acquired in the donation to the road."

On the 19th of February, 1867, a treaty was concluded between the United States and these bands, which was ratified on the 15th of April and proclaimed on the 2d of May of that year, 15 Stat. 505, in the second article of which the bands ceded "to the United States the right to construct wagon roads, railroads, mail stations, telegraph lines, and such other public improvements as the interest of the government may require, over and across the lands claimed by said bands (including their reservation as hereinafter designated), over any route or routes that may be selected by authority of the government, said lands so claimed being bounded on the south and east by the treaty line of 1851 and the Red river of the North to the mouth of Goose river, on the north by the Goose river and a line running from the source thereof by the

most westerly point of Devil's lake to the Chief's Bluff at the head of James river, and on the west by the James river to the mouth of Mocasin river, and thence to Kampeska lake." By articles III. and IV. certain lands were set apart as permanent reservations for the Indians—one of which was known as Lake Travers reservation, and the other as Devil's lake reservation—so called because their boundary lines commenced respectively at those lakes.

On the 7th of June, 1872, Congress passed an act "to quiet the title to certain lands in Dakota Territory," which provided that it should be the duty of the Secretary of the Interior to examine and report to Congress what title or interest the Sisseton and Wahpeton Bands of Sioux Indians had to any portion of the land mentioned and described in the second article of that treaty, except the reservations named; and whether any, and if any, what, compensation ought, in justice and equity, to be made to said bands for the extinguishment of whatever title they might have to said lands. 17 Stat. 281.

Under this act the Secretary of the Interior appointed three persons as commissioners to treat with the Indians for the relinquishment of their title to the land. On the 20th of September, 1872, they made an agreement or treaty with the bands for such relinquishment. This agreement recited the conclusion of the treaty of 1867, and the cession by it to the United States of certain privileges and rights supposed to belong to said bands in the territory described in the second article of the treaty; and that it was desirable that all the territory, except that portion comprised in certain reservations describedin articles III. and IV. of the treaty, should be ceded absolutely to the United States, upon such considerations as in justice and equity should be paid therefor; and that the lands were no longer available to the Indians for the purposes of the chase, and their value or consideration was essentially necessary to enable them to cultivate portions of the permanent reservations, and become self-supporting by the cultivation of the soil and other pursuits of husbandry. "Therefore," the agreement continues, "the said bands represented in said treaty, and parties thereto, by their chiefs and headmen, now assembled in council, do propose to M. N. Adams, William H. Forbes, and James Smith, Jr., commissioners on behalf of the United States, as follows:

"First. To sell, cede, and relinquish to the United States all their right, title, and interest in and to all lands and territory particularly described in article II. of said treaty, as well as all lands in the Territory of Dakota to which they have title or interest, excepting the said tracts particularly described and bounded in articles III. and IV. of said treaty, which last-named tracts and territory are expressly reserved as permanent reservation for occupancy and cultivation, as contemplated by articles VIII., IX., and X. of said treaty."

"Second. That, in consideration of said cession and relinquishment, the United States should advance and pay annually, for the term of ten years from and after the acceptance by the United States of the propositions herein submitted, eighty thousand ($80,000) dollars, to be expended, under the direction of the President of the United States, on the plan and in accordance with the provisions of the treaty aforesaid, dated February 19, 1867, for goods and provisions, for the erection of manual labor and public schools, and to the erection of mills, blacksmith shops, and other workshops, and to aid in opening farms, breaking land, and fencing the same, and in furnishing agricultural implements, oxen, and milk cows, and such other beneficial objects as may be deemed most conducive to the prosperity and happiness of the Sisseton and Wahpeton Bands of Dakota or Sioux Indians, entitled thereto, according to the said treaty of February 19, 1867."

This agreement contained seven other articles, some of which had provisions of great value to the Indians. It does not appear that it was ever presented to the Senate of the United States for ratification, but it was communicated to Congress by the Secretary of the Interior; and in the Indian appropriation act of February 14, 1873, an amount was conditionally appropriated to meet the first instalment of the sum provided by the second article—eighty thousand dollars. The condition was that the amount should not be expended until that agreement, amended by the exclusion of all the articles except the first two, should be ratified by the Indians. The agreement, exclusive of those articles, was confirmed by Congress. 17 Stat. 456.

The ratification of the agreement, as amended, was obtained from the Indians at the two reservations; from those on one reservation on May 2, 1873, and from those on the other reservation on the 19th of the same month. This ratification was accepted and approved by the Secretary of the Interior on the 19th of June, 1873, and the expenditure of the appropriation made was authorized. No approval of the agreement was had by Congress until the passage of the Indian appropriation act of June 22, 1874, by which it was confirmed, and an appropriation made to meet the second instalment of the consideration stipulated.

It appears by the findings of the court, that some time in the fall of 1871, under the act of Congress mentioned, and other acts and resolutions relating to the same subject, the railroad company commenced work on that part of its line of road beginning on the westerly bank of the Red River of the North (which was the eastern boundary of Dakota), and extending westerly through and across what was afterwards shown by the public surveys to be the section of land of which the premises in controversy form a part, namely, section 7 in township 139 and range 48. It also caused all that part of its line of road thus located to be graded and

prepared for its superstructure; and in June following the superstructure and the iron rails were laid, and that part of the road was completed which crossed the section named, and ever since the road has been maintained and operated.

On the 21st of February, 1872, the company filed in the office of the Secretary of the Interior a map showing that part of the general route of the road beginning at the westerly bank of the Red River of the North, and extending westerly to James River, in Dakota Territory. On the 30th of March following, the acting Commissioner of the General Land Office forwarded to the register and receiver of the Pembina land office, within the limits of which the tract of land in controversy was situated, a description of the designated route, and, by order of the Secretary of the Interior, directed them to withhold from sale or location, pre-emption, or homestead entry, all the surveyed and unsurveyed odd numbered sections of public lands falling within the limits of forty miles, as designated on the map, and stated that this order would take effect from the date of its receipt by them.

The order with the diagram was received by them April 20, 1872. The diagram represented the route of the road as passing over and across the section of land in question. The order of withdrawal thus given was never afterwards revoked.

On May 26, 1873, the company filed in the office of the Commissioner of the General Land Office a map, showing the definite location of that part of its line of road extending from the Red River of the North to the Missouri River in Dakota Territory. All that portion of this definite location, from the Red River to the west line of the section named, was the same as that made in 1871. On the 11th of June, 1873, the acting Commissioner of the General Land Office addressed a letter to the local register and receiver, informing them of the filing of this map of definite location, and transmitted to them a diagram showing the limits of the land grant along said line, and also the limits of the withdrawal ordered on March 30, 1872, upon a designated line; and directed them to withhold from sale or entry all the odd numbered sections, both surveyed and unsurveyed, falling within those limits. This letter, with the diagram referred to, was received at the Pembina land office on June 24, 1873.

Soon after the execution of the amended agreement with the Indians, mentioned above, which was approved by the Secretary of the Interior on the 19th of June, 1873, the government land surveys of the region embraced in it were completed, and plats thereof were filed in the local land office. Those surveys show that the premises in controversy constitute a portion of the odd section number seven, which was granted to the railway company.

The defendant, Peronto, settled, as already stated, upon that section on October 5, 1871. It is found by the court that he had

all the qualifications of a pre-emptor, and entered upon the land with the intention of securing a pre-emption right to it under the laws of the United States, and built a house upon it, in which he resided. On the 11th of August, 1873, he presented his declaratory statement to the register and receiver of the local land office, stating his intention to claim a pre-emption right to a portion of the section (describing it) and his settlement thereon in October, 1871. This declaratory statement was presented within three months after the township plats, showing the government surveys, had been filed in the local land office. The register and receiver refused to file it, for the alleged reason that the land therein described was the land of the railroad company, as shown by its diagram filed in the Department of the Interior, February 21, 1872, and that his alleged prior settlement was illegal, the lands not being subject to pre-emption settlement by reason of the Indian treaty. The defendant thereupon appealed from this ruling to the Commissioner of the General Land Office, by whom, on the 14th of February, 1874, it was approved and confirmed. The defendant then appealed to the Secretary of the Interior, and he approved the decision of the Commissioner.

Albert G. Riddle and *Henry E. Davis* for appellant.

James E. Padgett was with them on their brief.

FIELD, J.—The land in controversy and other lands in Dakota, through which the Northern Pacific Railroad was to be constructed, was within what is known as Indian country. At the time the act of July 2d, 1864, was passed, the title of the Indian tribes was not extinguished. But that fact did not prevent the grant of Congress from operating to pass the fee of the land to the company. The fee was in the United States. The Indians had merely a right of occupancy, a right to use the land subject to the dominion and control of the government. The grant conveyed the fee subject to this right of occupancy. The railroad company took the property with this incumbrance. The right of the Indians, it is true, could not be interfered with or determined except by the United States. No private individual could invade it, and the manner, time, and conditions of its extinguishment were matters solely for the consideration of the government, and are not open to contestation in the judicial tribunals. As we said in Beecher *v.* Wetherby, 95 U. S. 517, 525: "It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race. Be that as it may, the propriety or justice of their action towards the Indians with respect to their lands is a question of governmental policy, and is not a matter open to discussion in a controversy between third parties, neither of whom derives title from the Indians. The

FACTS—RIGHTS OF INDIANS.

right of the United States to dispose of the fee of lands occupied by them has always been recognized by this court from the foundation of the government." In support of this doctrine several authorities were cited in that case.

In Johnson *v.* McIntosh, 8 Wheat. 543, 575, which was here in 1823, the court, speaking by Chief Justice Marshall, stated the origin of this doctrine of the ultimate title and dominion in the United States. It was this: that, upon the discovery of America, the nations of Europe were anxious to appropriate as much of the country as possible, and, to avoid contests and conflicting settlements among themselves, they established the principle that discovery gave title to the government by whose subjects or by whose authority it was made, against all other governments. This exclusion of other governments necessarily gave to the discovering nation the sole right of acquiring the soil from the natives, and of establishing settlements upon it. It followed that the relations which should exist between the discoverer and the natives were to be regulated only by themselves. No other nation could interfere between them. The Chief Justice remarked that "the potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity in exchange for unlimited independence." Whilst thus claiming a right to acquire and dispose of the soil, the discoverers recognized a right of occupancy or a usufructuary right in the natives. They accordingly made grants of lands occupied by the Indians, and these grants were held to convey a title to the grantees, subject only to the Indian right of occupancy. The Chief Justice adds, that the history of America, from its discovery to the present day, proves the universal recognition of this principle.

In Clark *v.* Smith, 13 Pet. 195, 201, which was here in 1839, the patent under which the complainant became the owner in fee of certain lands was issued by the Commonwealth of Kentucky in 1795, when the lands were in possession of the Chickasaw Indians, whose title was not extinguished until 1819. It was objected that the patent was void because it was issued for lands within a country claimed by Indians, but the court replied, "That the colonial charters, a great portion of the individual grants by the proprietary and royal governments, and a still greater portion by the States of this Union after the revolution, were made for lands within the Indian hunting-grounds. North Carolina and Virginia, to a great extent, paid their officers and soldiers of the revolutionary war by such grants; and extinguished the arrears due the army by similar means. It was one of the great resources that sustained the war, not only by these States but by others. The ultimate fee (incumbered with the Indian right of occupancy) was in the crown previous to the revolution, and in the States of the Union afterwards,

and subject to grant. This right of occupancy was protected by the political power and respected by the courts until extinguished; when the patentee took the unincumbered fee. So this court, and the State courts, have uniformly and often holden."

In the grant to the railroad company now before us, Congress was not unmindful of the title of the Indians to the lands granted, and it stipulated for its extinguishment by the United States as rapidly as might be consistent with public policy and the welfare of the Indians.

In compliance with the pledge thus given, the United States took steps, first, to obtain from the Indians the right to construct railroads, wagon roads, and telegraph lines across their lands, and to make such other improvements upon them as the interests of the government might require, and afterwards to obtain a cession of their entire title.

The right to construct railroads and telegraph lines across their lands was secured by the treaty concluded on the 19th of February, 1867, ratified on the 15th of April, and proclaimed on the 2d of May of that year. The right was in terms ceded to the United States, but the cession must be construed to authorize any one deriving title from the United States to exercise the same right. 15 Stat. 505.

For the relinquishment of the entire title of the Indians to the lands, an agreement was made by commissioners appointed by the Secretary of the Interior, under the act of Congress of June 7, 1872. That agreement in form was merely a proposition by the Indians to cede their title, upon certain money considerations to be paid, and certain acts to be performed by the United States. Congress declined to approve of it in its entirety, but expressed an approval of it so far as it related to the cession of the title of the Indians upon the money considerations named. It refused, however, to allow an appropriation made to meet the first instalment of the money consideration to be expended, except upon the condition that the Indians should abandon the other provisions and ratify the agreement thus modified. The Indians on the different reservations accepted the condition and ratified the agreement as modified—those on one reservation on May 2, 1873, and those on the other on the 19th of the same month.

AGREEMENT WITH THE INDIANS.

The agreement, thus ratified, was forwarded to the Secretary of the Interior, and was approved by him on the 19th of June following; and on June 22, 1874, Congress approved it in the Indian appropriation act of that year, when it also provided for the payment of the second instalment of the money consideration.

This modified agreement must be considered as accepted, on the part of the United States, when it was approved by the Secretary of the Interior. Some official recognition was necessary to satisfy

those who might be interested as to the good faith of the alleged consent of the Indians; whether the parties acting nominally in their behalf really represented them, and whether their assent was freely given after full knowledge of the import of the legislation of Congress. Proof of these facts was not to rest in the recollection of witnesses, but in the official action of the officers of the government, or in the legislation of Congress. The agreement, however, on the part of the Indians was only to cede their title; it was not a cession in terms by them. The officers of the Land Department, however, treated it as an actual cession of title from its date. The Indians had then retired to the reservations set apart for them by the treaty of 1867, thus giving up the occupancy of the other lands. The relinquishment thus made was as effectual as a formal act of cession. Their right of occupancy was, in effect, abandoned, and full consideration for it being afterwards paid, it could not be resumed. The agreement in terms provided that it should be binding from its ratification. So, therefore, considered in connection with the actual retirement of the Indians from the land, it may properly be treated as establishing the extinguishment of their title from its date, so far as the United States are concerned.

EXTINGUISHMENT OF INDIAN TITLE.

The definite location of the line of railroad was subsequently made by the company, and a map of it filed with the Secretary of the Interior. The right of the company, freed from any incumbrance of the Indian title, immediately attached to the alternate sections, a portion of one of which constitutes the premises in controversy. The defendant could not initiate any pre-emptive right to the land so long as the Indian title remained unextinguished. The act of Congress excludes lands in that condition from pre-emption. Rev. Stat. § 2257.

If we are mistaken in this view, and the relinquishment of the right of occupancy by the Indians is not to be deemed effected until the agreement was ratified by Congress in June, 1874, notwithstanding their actual retirement from the lands, the result would not be changed. The right of the company to the odd sections within the limits of its grant, covered by the Indian claim, did not depend upon the extinguishment of that claim before the definite location of the line of the road was made, and a map thereof filed with the Commissioner of the General Land Office. The provisions of the third section, limiting the grant to lands to which the United States had then full title, they not having been reserved, sold, granted, or otherwise appropriated, and being free from pre-emption or other claims or rights, did not exclude from the grant Indian lands, not thus reserved, sold, or appropriated, which were subject simply to their right of occupancy. Nearly all the lands in the Territory of Dakota, and indeed a large, if not the greater, portion of the lands along the entire route to Puget Sound, on which the road of the company was to be constructed, was

subject to this right of occupancy by the Indians. With knowledge of their title and its impediment to the use of the lands by the company, Congress made the grant, with a stipulation to extinguish the title. It would be a strange conclusion to hold that the failure of the United States to secure the extinguishment at the time when it should first become possible to identify the tracts granted, operated to recall the pledge and to defeat the grant. It would require very clear language to justify a conclusion so repugnant to the purposes of Congress expressed in other parts of the act. The only limitation upon the action of the United States with respect to the title of the Indians was that imposed by the act of Congress, that they would extinguish the title as rapidly as might be "consistent with public policy and the welfare of said Indians." Subject only to that condition, so far as the Indian title was concerned, the grant passed the fee to the company. In our judgment, the claims and rights mentioned in the third section are such as are asserted to the lands by other parties than Indians having only a right of occupancy.

FEE PASSED TO COMPANY. FACTS.

Assuming that the extinguishment of the Indian title to the lands in controversy may, so far as any claim to them against the United States is concerned, be held to have taken place at the date of the amended agreement—taking the last date, when the Indians on the second reservation ratified it—the defendant did not acquire any right of pre-emption by his continued settlement afterwards. The act of Congress not only contemplates the filing by the company, in the office of the commissioner of the General Land Office, of a map showing the definite location of the line of its road, and limits the grant to such alternate odd sections as have not, at that time, been reserved, sold, granted, or otherwise appropriated, and are free from pre-emption, grant, or other claims or rights; but it also contemplates a preliminary designation of the general route of the road, and the exclusion from sale, entry, or pre-emption of the adjoining odd sections within forty miles on each side, until the definite location is made. The third section declares that after the general route shall be fixed, the President shall cause the lands to be surveyed for forty miles in width on both sides of the entire line as fast as may be required for the construction of the road, and that the odd sections granted shall not be liable to sale, entry, or pre-emption, before or after they are surveyed, except by the company. The general route may be considered as fixed when its general course and direction are determined after an actual examination of the country or from a knowledge of it, and is designated by a line on a map showing the general features of the adjacent country and the places through or by which it will pass. The officers of the land department are expected to exercise supervision over the matter so as to require good faith on the part of the company in designating the general route, and not to accept an arbitrary and ca-

pricious selection of the line irrespective of the character of the country through which the road is to be constructed. When the general route of the road is thus fixed in good faith, and information thereof given to the Land Department by filing the map thereof with the Commissioner of the General Land Office, or the Secretary of the Interior, the law withdraws from sale or pre-emption the odd sections to the extent of forty miles on each side. The object of the law in this particular is plain: it is to preserve the land for the company to which, in aid of the construction of the road, it is granted. Although the act does not require the officers of the Land Department to give notice to the local land officers of the withdrawal of the odd sections from sale or pre-emption, it has been the practice of the department in such cases to formally withdraw them. It cannot be otherwise than the exercise of a wise precaution by the department to give such information to the local land officers as may serve to guide aright those seeking settlements on the public lands; and thus prevent settlements and expenditures connected with them which would afterwards prove to be useless.

Nor is there anything inconsistent with this view of the sixth section as to the general route, in the clause in the third section making the grant operative only upon such odd sections as have not been reserved, sold, granted, or otherwise appropriated, and to which pre-emption and other rights and claims have not attached, when a map of the definite location has been filed. The third section does not embrace sales and pre-emptions in cases where the sixth section declares that the land shall not be subject to sale or pre-emption. The two sections must be so construed as to give effect to both, if that be practicable.

In the present case the general route of the road was indicated by the map filed in the office of the secretary of the interior on the twenty-first of February, 1872. It does not appear that any objection was made to the sufficiency of the map, or to the route designated, in any particular. Accordingly, on the thirtieth of March, 1872, the commissioner of the General Land Office transmitted a diagram or map, showing this route, to the officers of the local land-office in Dakota, and, by direction of the secretary, ordered them to withhold from sale, location, pre-emption, or homestead entry all surveyed and unsurveyed odd-numbered sections of public land falling within the limits of 40 miles, as designated on the map. This notification did not add to the force of the act itself, but it gave notice to all parties seeking to make a pre-emption settlement that lands within certain defined limits might be appropriated for the road. At that time the lands were subject to the Indian title. The defendant could not, therefore, as already stated, have then initiated any pre-emption right by his settlement, and the law cut him off from any subsequent pre-emption. The with

drawal of the odd sections mentioned, from sale or pre-emption, by the sixth section of the act, after the general route of the road was fixed in the manner stated, was never annulled. It follows that the defendant could never afterwards acquire any rights against the company by his settlement. Judgment affirmed.

See next case, and note.

KANSAS CITY, LAWRENCE, AND SOUTH KANSAS R. CO.

v.

ATTORNEY-GENERAL.

(118 *United States*, 682.)

The acts of Congress of March 3, 1863, 12 Stat. 772; July 1, 1864, 13 Stat. 339; and July 26, 1866, 14 Stat. 289, granting lands to the State of Kansas for railroad purposes, are to be construed *in pari materia*, and as having the one purpose of building a single road from Fort Riley, down the Neosho Valley, to the southern line of that State, and not as distinct grants for different roads, which may come in conflict in the claims under them in regard to the lands granted.

The junction of this road with the one from Leavenworth by way of Lawrence, in the direction of Galveston Bay, as provided in the act of 1863, was not required to be on the very crest of the Neosho Valley, as reached by the latter road, but at a convenient point for such crossing in the narrow valley of the Neosho River; and as this point has been adopted by the companies building both roads, and accepted by the officers of the Land Department in selecting indemnity lands, there is no sufficient reason to be found in the point of junction to vacate the certification of these lands to the State for the company which has built the road and received the patents of the State.

Nor is there any other sufficient reason found in the record in this case for setting aside the evidences of title to these lands issued to the corporation which built the road within the time required by law, to the approval of the officers of the government, whose primary duty it was to certify these lands, and who did so within the scope of their powers.

THIS was a bill in equity brought by the Attorney-General of the United States to quiet the title to certain lands in Kansas. The decree below was in favor of the attorney-general, from which the railroad company appealed. The case is stated in the opinion of the court.

George W. McCrary, *John F. Dillon*, and *A. T. Britton* (*James Hagerman* and *A. B. Browne* were with them on the brief) for appellant.

William Lawrence (representing settlers) for appellee.

Assistant Attorney-general Watson (the attorney-general was with him on the brief) for appellee.

MILLER, J.—This is an appeal from the circuit court of the district of Kansas. The suit is brought by B. H. Brewster, attorney-general of the United States, for and on behalf of the United States. The object of it is to set aside certain instruments in writing, which, if they are valid, are supposed to convey title from the United States for a considerable quantity of land in Southeastern Kansas.

FACTS.

An act of Congress, approved July 26, 1866, 14 Stat. 289, granted to the State of Kansas "every alternate section of land or parts thereof designated by odd numbers to the extent of five alternate sections per mile on each side of the road, and not exceeding in all ten sections per mile; . . . for the purpose of aiding the Union Pacific R. Co., Southern Branch, the same being a corporation organized under the laws of the State of Kansas, to construct and operate a railroad from Fort Riley, Kansas, or near that military reservation, thence down the valley of the Neosho River to the southern line of the State of Kansas, with a view to an extension of the same through a portion of the Indian Territory to Fort Smith, Arkansas. . . ."

There is the usual clause in this grant providing that if "it shall appear that the United States have, when the line of said road is definitely located, sold any section or any part thereof, granted as aforesaid, or that the right of preëmption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public lands of the United States nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or preëmption has attached as aforesaid, which lands, thus indicated by the direction of the Secretary of the Interior, shall be reserved and held for the State of Kansas for the use of said company by the said secretary, for the purpose of the construction and operation of said railroad, as provided by this act."

This railroad company, for whose benefit the grant was made to the State of Kansas, afterwards changed its name, by a valid procedure, into that of the Missouri, Kansas & Texas R. Co. Under this latter name it built the road contemplated by this

grant, which was completed in due time, and asserted a claim before the commissioner of the General Land Office for the lands now in question as indemnity for others lost by the previous sale, appropriation, or other disposition of them under the clause above cited in the act of 1866. These lands were on that demand certified to the State of Kansas, and by the State patented to the railroad company. The Missouri, Kansas & Texas R. Co. afterwards, for a valuable consideration, conveyed them to the appellant in the present case, the Kansas City, Lawrence & Southern Kansas R. Co.

The object of this suit is to vacate and declare void the certification of the lands by the Secretary of the Interior to the State of Kansas, as well as the patents issued by that State to the railroad company. There is no allegation of fraud, acccident, or mistake, except as the alleged want of authority or power in the officers of the United States to certify these lands to that State may be a mistake in law. Unquestionably, if there was no such power, the government has a right by this proceeding to have those instruments declared void and set aside as a cloud upon its title. The authority of the commissioner of the General Land Office and the Secretary of the Interior to make this certification of the lands to that State for the benefit of this company depends upon the true construction of this act of 1866, and of certain other statutes on the same subject.

Since the railroad company has constructed the road as contemplated by the statute, and has received the patents for the lands found in place along the line of this road, that is to say, every alternate section, of odd numbers, which had not been previously disposed of, and as the officers of the government have certified the lands now in controversy to be properly selected in lieu of such as were not found in place, it would seem to devolve upon the plaintiffs to show some reason why this authority has not been properly exercised, for the statute declares that the Secretary shall indicate these indemnity lands. It was his primary duty, and that of the commissioner of the General Land Office, to ascertain whether any lands, and, if so, what amount, were not found subject to the act by reason of previous disposition under the homestead or preëmption laws or reservations, and to select the indemnity lands. They have accordingly, both in the bill and in argument, set up the facts which they suppose to show the invalidity of these transfers.

The first of these, and the most important, is, that by an act of March 3d, 1863, 12 Stat. 772, and a supplementary act of July 1st, 1864, 13 Stat. 339, these lands became appropriated to the building of another road through the same region of country and through the same lands, the grant being to the State of Kansas for the purpose of building that road. It is argued that these grants,

instead of being made by Congress in aid of one and the same road, are different and conflicting grants, and that the earlier grants of 1863 and 1864 prevent the M., K. & T. R. Co. from realizing the bounty of Congress on that subject, because there is in the grant to the State for the benefit of the Union Pacific R. Co., Southern branch, an express reservation of any lands granted previously for railroad purposes. The language of the act of 1866 on this subject is as follows:

"Provided, that any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same are hereby, reserved to the United States from the operations of this act, except so far as it may be found necessary to locate the routes of said road and branches through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States."

As the lands granted by the prior acts of 1863 and 1864 had, by the act of the Legislature of Kansas, been granted to the Atchison, Topeka & Santa Fé R. Co., a then existing corporation of that State, for the purpose of building a road, with the same general description as to its course down the valley of the Neosho River, which might have run through these same lands if it had been built by the latter company, it is argued with great earnestness that these lands were necessarily reserved, under this clause of the act of 1866, from the grant, as being reserved by the authority of Congress for the purpose of aiding in that object of internal improvement. If the A., T. & S. F. R. Co. had built a line of road along the same general course and through the same lands, twenty miles in width, that the M., K. & T. R. Co. has occupied with its road, and asserted a claim to these lands, or to any of them, the argument would be almost irresistible.

If at the time that the act of 1866 was passed, the A., T. & S. F. R. Co., or any other company than the one to which the grant of 1866 was made, was intending to build a road or expected to build one, or had any authority from the State of Kansas to build one, under the acts of 1863 and 1864, the argument would have force. But on the 9th day of March, 1866, which was four months prior to the act of 1866, the A., T. & S. F. R. Co. entered into an agreement with the U. P. R. Co., Southern Branch (afterwards known as the M., K. & T. R. Co.), by which the latter company assumed all the obligations of the former in regard to building the road which that company had assumed in accepting the grant by the State of Kansas, in consideration of which the A., T. & S. F. R. Co. assigned to the U. P. R. Co., Southern Branch, all its right, title, and interest in the lands appropriated to the building of that road by the acts of March 3, 1863, and July 1, 1864, and

by acts of the Kansas legislature conferring these lands on that company, so that, with that exception of the ratification of this agreement and assignment by the State of Kansas, and so far as the two railroad companies themselves could make such an assignment, the U. P. R. Co., Southern Branch, to whom the grant of 1866 was made, had, before the passage of that act, become possessed of all the rights existing under the acts of 1863 and 1864 with regard to building a railroad down the Neosho Valley. It is not to be supposed that Congress was ignorant of this transaction, nor that, if the representatives in Congress of the State of Kansas had been opposed to the transfer, they would have consented to the passage of the act of 1866. But as that State did ratify this transfer by the company to the other within six or eight months after it was made, it is reasonable to suppose that Congress, in legislating upon such an important grant of public lands for public uses, did not intend to have two parallel roads for a long distance within the narrow strip of the Neosho Valley, but did intend by all this legislation to secure one road, and, being aware of the transfer by the A., T. & S. F. R. Co. to the U. P. R. Co., Southern Branch, and of the willingness of the State of Kansas, when her legislature could meet, to ratify that transfer, designed by the act of 1866 to place also in the hands of the latter company the same right and the same grant for the same purposes, and for the one road.

In support of this view it will be seen that, in the latter act of 1866, Congress, departing from the principle of the former acts of making the grant directly to the State without prescribing by what means or by what corporation it should construct the road, declares expressly that the grant is made to the State of Kansas for the benefit of the U. P. R. Co., Southern Branch, and it did this obviously for the purpose of consolidating all these grants into one grant in the hands of that company, which already had all the rights vested by the other statutes necessary to enable it to build this road down the Neosho Valley. The history of the legislation of Congress and of the State of Kansas on this subject almost conclusively shows that the several statutes are to be taken and construed as *in pari materia*, and that the only object was the building of one road. By the act of 1866 there was no grant in aid of any other road but that one. The act of 1863 made the grant to the State of Kansas for the purpose of aiding in the construction of a road from the city of Atchison, by way of Topeka, the capital of the State, to the west line of the State, with a branch from where this road crosses the Neosho, down the valley of that river to the point where a road from Leavenworth and Lawrence south, for which a grant was made in the same act, crosses the Neosho Valley. In this act no corporation is named, but it was left to the State, to which the grant was made, to employ such agency in the

way of a corporation, private individuals, or its own officers, for the building of the road as it might choose. This point of intersection with the Neosho River was some distance south of Fort Riley, through which the main branch of the U. P. R., Eastern Division, passed on its way from the Missouri River to the Pacific coast, and was at or near the town of Emporia. In 1864 Congress passed an act making an additional grant of lands to the State for a railroad from Emporia by way of Council Grove, to a point near Fort Riley on the branch Union Pacific R., in said State. Both of these acts were accepted by the State of Kansas, and both the lands granted and the right to build the road mentioned in these acts of Congress were conferred upon the A., T. & S. F. R. Co. by the State. These two pieces of road, if ever they were built, would necessarily constitute one continuous road from Fort Riley down the Neosho Valley to the point where the road should cross the line of the Leavenworth, Lawrence & Fort Gibson R., and this is the road built by the M., K. & T. R. Co. under the act of 1866 and under its contract with the A., T. & S. F. R. Co. and the grants of the State of Kansas. Now, it is a constrained construction of the act of 1866, in the face of all the probabilities of the case, imputing to Congress, in which the State had two senators and several members of the House of Representatives, great carelessness to hold that they intended each one of these separate statutes to stand by itself, and the claims to be asserted under them to be distinct grants for different railroads. It is much more reasonable and consonant to all we know of the transaction, and the consideration of the almost certainty that Congress had in view the single purpose of building one road down the Neosho Valley, from Fort Riley to the point of intersection with the other road, and that it was aware of the agreement between the A., T. & S. F. R. Co. and its grantee in the act of 1866, to hold that it intended by the latter act to ratify and make good the right which the U. P. R. Co., Southern Branch, already had to the same lands for the purpose of building that road.

The fact that the act of 1866, while in general terms granting these lands to the State of Kansas, declared that that State should hold them for the benefit of the U. P. R. Co., Southern Branch, so far, from militating against this view of the subject, tends to confirm it. Intending to ratify, make good, and add to the force of the title of that company, which it had derived from its agreements with the A., T. & S. F. R. Co., it did not leave it even in the power of the State of Kansas to confer these lands upon any other company than this one, and thereby prevented all conflict of claims under these several grants. This view of the subject was taken by Mr. Browning, Secretary of the Interior, in a letter addressed to the commissioner of the general land office, March 25, 1867, directing the withdrawal of the lands along the line of the

road from public sale or preemption for the benefit of the U. P. R. Co., Southern Branch, and it has been acted upon by the land department and by the various secretaries of the interior, from that day to this, as the true construction of the statutes. It is true that when the M., K. & T. R. Co. made its application for the lands now in controversy as indemnity lands, it asserted rights under the acts of 1863 and 1864 by virtue of the assignment of the A., T. & S. F. R. Co., and the ratification of that assignment by the State of Kansas, and also under the act of 1866 directly to that company; and it is true that the Secretary of the Interior, while acknowledging the claim to have been made under all the acts, certified the lands to the State of Kansas in accordance with the terms of the acts of 1863 and 1864, instead of issuing patents directly to the railroad company as was provided for in the act of 1866. But since that company had all the rights conferred by all three of these statutes, and by the ratification by the State of Kansas of the transfer from the A., T. & S. F. R. Co., and since that State, after these lands were certified to it for the benefit of this company, issued to it patents of the State for those lands, it is obvious that the company thus acquired the real ownership and the equitable interest in the lands which it had earned by building the road, in accordance with the provisions of all the statutes and all the contracts made upon the subject. If there be any informality in the attempt of the Secretary of the Interior and the State of Kansas to confer upon the railroad company the legal title to these lands, it is for the company to seek relief and to have these informalities corrected, not for the United States to set aside its solemn instruments in which those rights are evidenced, and under which not only the railroad company then interested, but its grantee, the present appellant, holds these lands or has sold them to innocent purchasers. So far, then, as this objection goes, that one of these acts of Congress nullifies the others, we think it to be untenable.

INFORMALITIES IN CONFERRING TITLE.

Another objection strongly insisted upon arises out of the language of the act of 1863. That act provided for two roads, with branches to each. The first was a road from the city of Leavenworth, by way of the town of Lawrence, to the southern line of the State, in the direction of Galveston Bay, in Texas. The second was a road from the city of Atchison, by way of Topeka, to the western line of the State, in the direction of Fort Union and San ta Fé, in New Mexico, with a branch from where this last-named road crosses the Neosho River, down the valley of that river to the point where the said first-named road enters the said Neosho Valley. This branch down the Neosho Valley is the road now under consideration, and the grant of lands of 1863 is to the point on its line where the firstnamed road, the Leavenworth, Lawrence & Fort Gibson, enters the said Neosho Valley.

It is said that the road of the M., K. & T. R. Co. which we have already held to represent the grant of Congress under this statute, was not constructed to the point where the L., L. & F. G. R. entered the Neosho Valley, but that those two roads joined at a point far within the entrance of the L., L. & F. G. R. into the valley, the distance is said to be about eight or ten miles, and this is supposed to defeat the right of the company building this road to the lands on each side of it. But we are of opinion that this is too narrow a construction of the language describing the point at which the two roads mentioned in the same statute were expected to meet and cross each other. The construction thus asserted required that the exact point of the high ground on the north of the Neosho River should be ascertained with great precision where the railroad of the other company, coming from the north, enters the valley. It seems to us, however, that the purpose of Congress was to make a grant of lands along the Neosho Valley to the company which should build it to the most appropriate point, wherever that might be, in this narrow valley at which the two roads might chance to come together; and that, as the road has been built and the lands earned, and the officers of the Federal Government having charge of the matter have accepted this place of junction as the proper one to govern the selection of lands for the company building the road, and since neither of those roads make any objection to this decision, and it is impossible to see how any substantial right of any person can be injured by it, that it is the duty of the court to accept the location of the road as a proper location in accordance with the action of the officers of the Land Department; and that it is not a case for the Government of the United States to interfere to set aside its own action in the matter, under the loose terms employed in the acts of Congress.

FAILURE TO BUILD ROAD— CONSTRUCTION OF ACT.

In support of this view of the subject it must appear to any thinking mind that the grant of lands to the M., K. & T. R. Co. would not be defeated if the other road from the north did not build into the valley of the Neosho River at all; and yet, if the strict and literal construction of the phrase, "where that road enters the valley," should be adopted, that would be the effect upon the grant. The purpose of Congress being to have these roads cross within the narrow valley of the Neosho River, and the grant of lands to the M., K. & T. R. Co. terminate at the point where it came to a junction with the L., L. & F. G. R., the latter being continued on to the south, we do not think this objection sufficient to justify a decree setting aside the action of the officers of the government.

It is to be observed that this objection is raised under the language of the act of 1863, and that the act of 1866 contains no such requirement as that with reference to the crossing of the roads, it

being declared in the latter act that the road is to be built down the valley of the Neosho River to the southern line of the State. Of course, if the act of 1866 is, as we suppose, supplementary to the acts of 1863 and 1864, the description of the route of the road and its terminus in the later act is the one which must govern the grant of lands.

Another objection urged to the ownership of the lands by this company under the patents from the State of Kansas is, that the company has received more land than it was entitled to under the grant. We do not think it necessary to enter into the details of the evidence of how much land was granted, how much was found in place, and how much the road was entitled to as indemnity for lands not so found in place. In the first place, we are not at all satisfied by the evidence in the record that the lands received are in excess of the various grants to this company. In the next place, the issue is not made fairly in the bill, and certainly no particular certificate nor any particular patent from the State of Kansas is pointed out as being the one which contains the excess over the grant, and it is not possible for the court, under any evidence or any pleading, to ascertain which of these certificates and of these patents, or what particular portions of them, should be held void and what valid. United States *v.* Burlington & Missouri River Railroad, 98 U. S. 334.

OBJECTION THAT COMPANY HAS RECEIVED TOO MUCH LAND.

And lastly, while we are not disposed to hold the action of the officers of the Land Department of the government as absolutely conclusive upon such a subject as this, we see no reason why their deliberate action, with careful attention, and all the means of ascertaining what was right, should be set aside in this case. There are other grounds urged for granting the relief sought by the bill but they are not sufficient to justify such a decree, nor are they important enough to require further discussion here.

The decree of the circuit court is reversed, and the case remanded to it, with directions to dismiss the bill.

Railway Land Grants.—There are a multitude of decisions construing land grants to railway companies. We collate those with reference to some of the more important controversies in reference to railway lands.

Homestead Rights against Railway.—In Atchison, etc., R. Co. *v.* Pracht, 12 Am. & Eng. R. R. Cas. 267, it is held that a railway company acquires no right to land by location of road or selection where there is a prior homestead right. Lands duly reserved by competent authority cannot be preempted, and an act of the land department reserving property from preemption *held* not to have been nullified by a subsequent resolution of Congress. Ballard *v.* Des Moines, etc., R. Co., 14 Am. & Eng. R. R. Cas. 529. See also Dubuque, etc., R. Co. *v.* Des Moines Valley R. Co., 14 Id. 532.

Claimants under legislative grants must show clear title. Gifts of public domain are never presumed. Rice *v.* Sioux City, etc., R. Co., 14 Am. & Eng. R. R. Cas. 549. Incorporators are not entitled to divide up lands among themselves. Brown *v.* Florida South. R. Co., 16 Id. 463.

Indemnity or Lieu Lands.—As to what the company must prove to estab-

lish title to indemnity lands for which a patent is already given, see Cedar Rapids, etc., R. Co. *v.* Jewell, 12 Am. & Eng. R. R. Cas. 277. See also note, 11 Am. & Eng. R. R. Cas. 503.

Taxation of Railway Lands.—The State may tax property of railroad corporation within boundaries of military reservation. Fort Leavenworth, etc., R. Co. *v.* Lowe, 13 Am. & Eng. R. R. Cas. 370. Under charter exempting capital stock and dividends to a certain amount from taxation, lands granted to a company by a State to aid in construction of road are not exempt. Memphis, etc., R. Co. *v.* Loften, 13 Id. 377. A statute exempting swamp lands from taxation for ten years or until reclaimed, means that the exemption shall cease if the lands are reclaimed in ten years. Memphis, etc., R. Co. *v.* Loften, 13 Id. 377. See also notes, 13 Id. 245, 376, 380; 17 Id. 397.

When Title Passes.—In Northern Pac. R. Co. *v.* Majors, 14 Am. & Eng. R. R. Cas. 487, the title of the company upon location of the road was held to date back to the passage of the original act, and not to depend upon the patent. It was also held in this case that the grant was upon a condition subsequent, viz., the completion of a specified portion of the road in specified time; that the United States only could take advantage of a failure to perform this condition, and that the effect of issuing a patent was to make the grant absolute and unconditional. In Swann *v.* Lindsay, 14 Am. & Eng. R. R. Cas. 504, a grant to a State to aid in the construction of railroads was held to pass a present title subject to be divested upon proper action taken in case of failure to build road in the time specified. Immediately upon location all title passed out of the United States, subject to sale or entry. In this case it was also held that where land is granted to a State in aid of a railway the State can only give the same to the railroad company as fast as the road is done, and that until then the title stays in the State. See also Swann *v.* Lindsay, 14 Am. & Eng. R. R. Cas. 519.

Construction of Grant as to what Lands were Meant, etc.—In Dubuque, etc., R. Co. *v.* Des Moines Valley R. Co., 14 Am. & Eng. R. R. Cas. 532, it was held that a grant of land to Iowa for improvements of Des Moines river did not extend above Raccoon Fork. In the absence of words of unmistakable import it will not be presumed that Congress has granted lands to which the Indian title has not been extinguished. In Cedar Rapids, etc., R. Co. *v.* Herring, 14 Id. 537, a statute authorizing a change in location was construed to make land grants along original route, but only in proportion to length of new line, and not in proportion to length of line on original location.

In Wilkinson *v.* North. Pac. R. Co., 20 Am. & Eng. R. R. Cas. 320, the right of way of the North. Pac. R. Co. was held a superior title to that of lands acquired by location and patent subsequent to date of act of Congress granting right of way to company.

Forfeiture of Land Grants.—See notes, 13 Am. & Eng. R. R. Cas. 172; 14 Id. 504.

Public Land—Grant of Alternate Sections of Unsurveyed Lands to Northern Pacific Railroad Company—Grant in Severalty—Equity—Account—Owners in Severalty of Undescribed Parts of Tract of Land.—Under the grant of lands in the charter of the Northern Pacific R. Co., which provides "that there be, and hereby is, granted" to said company every alternate section of public land, not mineral, designated in odd numbers, to the amount of 20 alternate sections per mile on each side of said railroad line, as said company may adopt, through the territories of the United States, and providing for a survey of the land when the line of the road is located, previous to the survey of the lands the government and the company are not tenants in common, but the latter takes, from the date of the charter, a grant in severalty, to be applied to the subject-matter upon the fixing of the

line of the road and survey of the lands. Where a tract of land is owned, in ascertained proportions, by two persons, but the particular part of the land owned by each is not defined by application to the subject-matter, a suit for an accounting is not the proper method of determining the damage to the interest of one of the parties by the other cutting timber on the land, as they are not tenants in common, and it is impossible to tell on whose land the timber was cut. United States *v.* Northern Pacific R. Co., 12 Pac. Repr. 769.

Public Lands—Grant of Lands for Railroad Purposes—Sale of, before Construction of Road—Defective Title.—Under an act of Congress approved June 3, 1856, certain lands were granted to the State of Alabama to aid in the construction of certain railroads. To the rights of two of them the Alabama & Chattanooga R. Co. succeeded, and, before the completion of their road, one D., professing to act as the authorized agent of the company, sold, under two executory contracts, two tracts of these lands—one of 160 acres, and another of 40 acres—with certain reservations, to B., from whom, through several intermediate conveyances, the complainant, M., derived his title. The record showed that these two tracts were not embraced in the first 120 sections which the acts authorized to be sold in order to construct the first 20 miles of the road, and there was neither averment nor proof that the requirements of section 4 of the act of 1856 had been complied with in such manner as to authorize the alleged contracts of sale. *Held*, in a suit for specific performance of the contracts, (1) that, conceding they were executed by authority of the corporation, the sale having been made before the road was constructed, no title could pass; (2) that the title of B. was not confirmed by any subsequent legislation; (3) that the contracts of sale, being void for illegality, was incapable of ratification. Swann *v.* Miller, 1 South. Repr. 65.

Generally.—For a note reviewing the whole subject of land grants, see 12 Am. & Eng. R. R. Cas. 281.

Mayor, etc., of Athens

v.

Georgia Railroad.

(72 *Georgia*, 800.)

The municipal authorities of the city of Athens passed an ordinance that "no person or persons shall be allowed to store any guano or commercial fertilizer at any point within the corporate limits of the city of Athens without first obtaining the consent of the mayor and council." At that time, the Georgia Railroad had within the city of Athens, on the east side of the Oconee river, a depot and a building for the storage of commercial fertilizers, in which they were then stored. Subsequently the railroad company abandoned this depot and building, and moved across the river, nearer the centre of the city, and at great expense erected other depot buildings and a house wherein they stored commercial fertilizers for their consignees. No objection was made to this by the municipal authorities; but subsequently

they fined the railroad agent and threatened further punishment both to him and the consignees:

Held, that the ordinance does not apply to such a storehouse of the railroad; and the municipal authorities having seen the company move its depot and proceed to erect buildings, without objection or warning that it would not be allowed to store fertilizers there, they are now estopped from asserting the ordinance against the company.

Whether the ordinance is prohibitory and in restraint of trade, and therefore contrary to public policy and void, is not decided. The act of December 21, 1833 (Prince's Dig. 304), authorizing the Georgia R. Co. to purchase all lands contiguous thereto "that may be found necessary for the erecting tollhouses, storehouses, workshops, barns, etc.," invested that company with the right to purchase land and erect storehouses in the city of Athens, and to store therein such merchandise, commercial fertilizers and other freight as was necessary for its preservation and security, and the city of Athens has no power under its municipal authority to declare such storehouses, so erected and stored with freight, nuisances, or to abate the same, or to punish the company or its servants or agents for such storage.

BEFORE Judge Estes. Clarke county. At chambers, February 15, 1884.

T. W. Rucker and *Alexander S. Erwin* for plaintiffs in error.

J. B. Cumming and *George D. Thomas* for defendant.

BLANDFORD, J.—The mayor and council of the city of Athens some years ago passed the following ordinance:

"No person or persons shall be allowed to store any guano or commercial fertilizer at any point within the corporate limits of the city of Athens without first obtaining the consent of the mayor and council."

The Georgia Railroad had at that time within the city of Ath-
FACTS. ens, on the east side of the Oconee river, a depot and a building for the storage of commercial fertilizers, in which they were then stored. Subsequently, some year or two ago, the railroad company abandoned this depot and building, and moved across the river nearer the centre of the city, and at great expense erected other depot buildings and a house wherein they stored commercial fertilizers for their consignees. The authorities of the city of Athens made no objection to this. Afterward the agent of the railroad company was fined one hundred dollars for a violation of the above ordinance; also the municipal authorities of Athens fined certain of the consignees of these fertilizers, and are now threatening to fine and otherwise punish the agents of the railroad company for a continued violation of this ordinance.

This bill was filed by the Georgia Railroad Co. to enjoin this action of the municipal authorities of the city of Athens. At the hearing, the chancellor granted the injunction prayed for; the city of Athens excepted to this decree granting this injunction; and this is the complaint here for our consideration. Whether the ordinance referred to is prohibitory, and as such is in restraint of trade, and thereby contrary to public policy and void, we do not decide.

But we are of the opinion that the ordinance, under the facts of this case, does not apply to the defendant in error.

The defendant in error is a public carrier, and is bound, under the law of this State, to deliver at Athens all articles of merchandise, including commercial fertilizers, which it may have received for that purpose, and it is bound to take due care of all such articles while in its possession and before delivering to the consignees, and to this end it may erect storehouses for the safe-keeping of all such goods as it cannot make immediate delivery of. This is its duty as charged by the law. DUTY OF A RAILROAD COMPANY AS A CARRIER.

When this company moved across the river and were proceeding to erect its buildings and storehouses, then the city authorities should have notified the company that they would not be allowed to store commercial fertilizers in such houses. This was but good faith on the part of the city, as it must have known, from the past course of the company, that such was the intention of the company by the erection of a storehouse, the defendant in error being a common carrier, and having in the past transported large quantities of commercial manures, and that large storehouses were necessary for the proper protection of the same. The plaintiff in error must have known what the purpose and objects of defendant in error were in erecting the large storehouse in which it stored such fertilizers. Such being the presumption, and no note of warning being given defendant in error that it would not be allowed to store these fertilizers in such storehouse erected by it, the plaintiff in error is now estopped from claiming and asserting the ordinance against the defendant in error. We think it quite clear that it was never intended by this ordinance to prohibit the storage of fertilizers by railroad companies for their consignees. LICENSE.

The act of the legislature, approved December 21, 1833 (Prince's Digest, p. 304), which authorized the Georgia Railroad Co. to purchase all lands contiguous thereto "that may be found necessary for the erecting toll-houses, store-houses, workshops, barns, etc.," invested this company with the right to purchase lands and erect storehouses in the city of Athens, and to store therein such merchandise, commercial fertilizers and other freight as was necessary for its preservation and security, and the city of Athens has no power, under its municipal authority, to declare such storehouses, so erected and stored with freight, nuisances, and to abate the same, or to punish said railroad company, or its servants or agents, for so doing. The exercise of the right to store freight of any kind by the defendant in error in such storehouses or barns as may have been erected by it is in accordance with its charter, and no municipal corporation has the right or power to interfere therewith, and in so far as the city of Athens sought to interfere with this privilege thus granted to the Georgia Railroad, all such acts and ordinances are void.

Let the decree granting the injunction in this case stand affirmed.

PEOPLE, Respondents,

v.

NEW YORK AND LAKE ERIE R. Co., Appellants.

(*Advance Case, New York. January* 18, 1887.)

There is nothing in the provisions of the general railroad act—Laws of 1850—by which a company organized thereunder can be compelled to provide suitable freight and passenger houses at a village located upon the line of the road. The law leaves the matter entirely to the discretion of the company.

Neither have the railroad commissioners any authority which can be enforced in the courts to require the company to provide such accommodations.

APPEAL by the defendant from an order of the general term, fifth department, affirming an order made at special term, awarding a peremptory writ of *mandamus* against that defendant company, directing it to forthwith erect and maintain a suitable depot building, of sufficient size and capacity, to accommodate passengers arriving and departing on its road, at the village of Hamburg, Erie county, N. Y., as well as such passengers as may be in waiting on ordinary occasions, to depart from the village of Hamburg, on the line and by the way of defendant's road, and of sufficient capacity to accommodate such quantities of freight as are usually received at that village, or that may be shipped therefrom by the way of said road.

Mr. Sprague for appellants.

Mr. O'Brien, attorney-general, for respondents.

DANFORTH, J.—Upon motion on notice by the attorney-general for a *mandamus* requiring the defendant to construct and maintain on the line of its road at the village of Hamburg, a building of sufficient capacity to accommodate its passengers arriving at that place, or departing therefrom, or in waiting to depart, and such freight as is usually received at, or shipped from that point, it ap-
FACTS. peared that the village of New Hamburg contains twelve hundred inhabitants, and furnishes to the defendant at a station established by it, a large freight and passenger business, that its depot building is entirely inadequate for these purposes, and the absence of a depot building and warehouse sufficient for the accommodation of passengers and freight has been and continues to be a matter of serious damage to large numbers of persons doing business at that station. These facts were conceded by the defendant. It also appeared that upon complaint made to the

railroad commissioners upon notice to the defendant, that body adjudged and recommended that the railroad company should construct a suitable building at that station within a time named, but although informed of this determination, the defendant failed to comply, or do anything toward complying with it, not for want of means or ability to do so, but because "its directors decided that the interests of the defendant required it to postpone for the present the erection or enlargement of the station-house or depot at the village of Hamburg."

The supreme court at special term granted the motion, and, adopting the language of the railroad commissioners, ordered that the defendant "forthwith construct and maintain a suitable depot building, of sufficient size and capacity to accommodate passengers arriving and departing on said road at the village of Hamburg, as well as such passengers as may be in waiting on ordinary occasions to depart from the said village on the line and by the way of said defendant's road, and of sufficient capacity to accommodate such quantities of freight as are usually received at such village, or that may be shipped therefrom by the way of said New York, Lake Erie & Western R."

Upon appeal to the general term, the order, after very careful consideration, was affirmed. The railroad company appeals. We agree with the court below that, at common law, the defendant as a carrier is under no obligation to provide warehouses for freight offered, or depots for passengers waiting transportation. But that court has found such duty to be imposed by statute. To this we are unable to assent. The question arises upon the construction of the general railroad act—Laws of 1850, chap. 140—and its amendments. Under that act many companies have been formed to construct, maintain and operate railroads in a manner so affecting persons and private property as to be utterly indefensible, except upon the theory formulated by the express words of the statute, that the roads, when constructed, should be "for public use in the conveyance of persons and property." To promote that purpose, and for that purpose only, such company may take the property of a citizen without his consent—§§ 1, 18—interfere with his travel and transportation by changing the lines of highways as may be desirable, with a view to the more easy ascent or descent of their own road—§ 24—and even appropriate to its purposes the land of a town, or county, or the State. § 25. All those, and other like powers, are justified upon the ground that, when exercised, they are the acts of the government performed indirectly through the medium of a corporate body. It follows, of course, that the legislature has control over it, and may compel the exercise of its functions, and direct the management of its business and use of the road as, in their judgment, will best subserve the public interest.

The court below does not find, nor does the respondent claim, that the legislature has at any time, in express and specific terms, imposed upon a railroad company the duty of erecting or maintaining a depot or warehouse. It is sought to be implied. The company is empowered to erect and maintain all necessary and convenient buildings, stations, etc., for the accommodation and use of their passengers, freight and business"—Id., § 28, subd. 8—and may acquire and hold real estate and other property for these purposes, "as may be necessary to accomplish the object of its incorporation." There are some other provisions in the same direction; none go further than those cited. But from these, and from the circumstances first referred to, that the company is exercising a public trust, and to that cause owes its existence and capacity to enjoy and profit by the franchise it has accepted, it is argued by the respondent that the right to construct a station, and its necessity, carries with it an obligation to do so in a proper manner. In regard to the facts there is no dispute. A plainer case could hardly be presented of a deliberate and intentional disregard of the public interest and the accommodation of the public. The railroad commissioners have thought that it was essential for those purposes that a new and enlarged building for passengers and freight should be erected. That it is true was a question for them to decide.

NO EXPRESS DUTY AS TO DEPOT IS IMPOSED —IMPLIED DUTY CONSIDERED.

The statute—Laws of 1882, chap. 353—created a commission of competent persons," required from them an official constitutional oath, assigned to them an office for the transaction of business, provided a clerk to administer oaths to witnesses and a marshal to summon them, gave full power of investigation and supervision of all railroads and their condition, with reference not only to the security, but accommodation of the public, and declared that whenever in their judgment it shall appear, among other things, that any addition to change of the stations or station-houses is necessary to promote the security, convenience, or accommodation of the public, they shall give notice to the corporation of the improvements and changes which they deem to be proper, and if they are not made, they shall present the facts to the attorney-general for his consideration and action, and also to the legislature. All these things have been done. The commissioners have heard and decided. They can do no more. After so much preliminary action by a body wisely organized to exercise useful and beneficial functions, it might well be thought unfortunate that some additional machinery had not been provided to carry into effect their decision. By creating, the statute recognizes the necessity for such a tribunal to adjust conflicting interests and controversies between the people and the corporation. It has clothed it with judicial powers to hear and determine, upon

RAILWAY COMMISSION STATUTE INTERPRETED.

notice, questions arising between these parties, but it goes no further. Its proceedings and determinations, however characterized, amount to nothing more than an inquest for information. We find no law by which a court can carry into effect the decision. At this point the law fails, not only by its incompleteness and omission to furnish a remedy, but by its express provision that no request or advice of the board, "nor any investigation or report made by" it, shall have the effect to impair the legal rights of any railroad corporation. The attorney-general is given no new power. He may consider the result of the investigation made by the commissioners, and their decision, and so may the company, but we must look further for his right of action, and the corporation, disregarding the judgment of the commissioners, may continue the management of its business in its own way, may determine, in its own discretion, to what extent and in what manner the exercise of a public trust requires it to observe the "secuity, convenience, and accommodation of the public."

It may admit, as they do in this case, the accommodations we furnish are not sufficient, they are not suitable; the omission to furnish different and better entails injury upon the public, but we will give no better, nor make alterations until we choose. The raillroad commissioners are powerless, and as the law now stands, neither the attorney-general of the State nor its courts can make their order effectual.

Cases are cited by the respondent in support of a different contention. Some of them turn upon statutory provisions, as those arising in Connecticut, where the law makes the order of the commissioners effectual by authorizing its enforcement. State *v.* Railroad Co., 37 Conn. 153. Under our statute, the public gain nothing in any legal sense from the determination of the commissioners. It is not enforceable as a judgment; it is not even a command, if it affects the railroad company at all; it is as advice merely. It can compel them only through the interposition of the legislature, who may, indeed, make it effectual by action upon their report, or by some general law, if it be deemed expedient, giving force and efficacy to their determinations. AUTHORITIES.

In the next place, as the duty sought to be imposed on the defendant is not a specific duty prescribed by statute, either in terms or by reasonable construction, the court cannot, no matter how apparent the necessity, enforce its performance by *mandamus*. It cannot compel the erection of a station-house nor the enlargement of one. The power of the company to provide such buildings is under the statutes a permissive one only. If the corporation choose to exercise it, it may. The statute does not exact it. It specifies certain things which the company shall not do. It specifies many things which it shall do, as, among others, "start and run its cars for the transportation of passengers MANDAMUS.

and property, at regular times, to be fixed by public notice, and furnish sufficient accommodations for the transportation of all such passengers and property as shall, within a reasonable time previous thereto, being offered for transportation at the place of starting and at the junctions of other railroads, and at usual stopping places established for receiving and discharging way passengers and freight for that train, and shall take, transport, and discharge such passengers and property at and from and to such places, on the due payment of fare or freight legally authorized therefor, and shall be liable to the party aggrieved, in an action for damages, for any neglect or refusal in the premises;" and it must do some other specified things for their accommodation.

The statute is peremptory as to many matters, but it nowhere says that for its intending passengers or waiting freights cover by building of any kind shall be provided. As to that, the statute imports an authority only, not a command, to be availed of at the option of the company in the discretion of its directors, who are empowered by statute to manage "its affairs," among which must be classed the expenditure of money for station buildings or other structures for the promotion of the convenience of the public, having regard also to their own interest. With the exercise of that discretion the legislature only can interfere. No doubt, as the respondent argues, the court may, by *mandamus*, also act in certain cases affecting corporate matters, but only where the duty concerned is specific and plainly imposed upon the corporation. It was so in People *v.* D. & C. R. Co., 58 N. Y. 152, where the defendant was compelled to restore an invaded highway to its former usefulness—a statutory duty—Laws of 1850, ib., § 28, subd. 5; so in People *ex rel.* Kimball *v.* B. & A. R. Co., 70 N. Y. 569, to build a bridge as directed to by statute—Laws of 1874, chap. 648; in People, etc., *v.* R. & S. L. R. Co., 76 N. Y. 294, to erect fences as directed by statute 1850, *supra*. All these cases cited by the learned attorney-general, and there are many others, go upon the ground above stated.

STATUTE DOES NOT DIRECT BUILDING OF DEPOTS.

Such is not the case before us. The grievance complained of is an obvious one, but the burden of removing it can be imposed upon the defendant only by legislation. The legislature created it upon the theory that its functions should be exercised for the public benefit. It may add other regulations to those now binding it, but the court can interfere only to enforce a duty declared by law. The one presented in this case is not of that character; nor can it, by any fair or reasonable construction, be implied. The whole subject of the relation between the company and its passengers and freight appears to have been in contemplation of the legislature. Certain acts toward them, as we have seen, are made imperative as duties—§ 36; others, and among them the erection

of stations and buildings, are made possible by permission. § 28, subd. 8. We cannot disregard this difference in language, and give by implication to one phrase the same force and meaning the legislature has by express terms conveyed in the other. We are constrained, therefore, to hold that the appeal must succeed.

The order appealed from should be reversed, and the motion denied, with costs.

All concur; RAPALLO, J., in result.

Order reversed.

Compelling a Railroad Company to Build Stations.—The question whether a railway company can be compelled to put up a station has within two years past twice been before the courts, and has been in each case affirmatively answered. See Republican Valley R. Co. *v.* Mattoon, 22 Am. & Eng. R. R. Cas. 500, and North. Pac. R. Co. *v.* Territory, *ante*, page 82. In the note to *Ex parte* Koehler, *ante*, page 54, we enumerated a line of authorities in which *mandamus* had been held a proper writ to compel action by a railway company. To the cases there named may be added the following in which the writ of *mandamus* has been awarded to compel a company to complete its road: Farmers' L. & T. Co. *v.* Henning, 17 Am. L. Reg. (N. S.) 266. Also to compel it to so grade its tracks as to make crossings on a highway convenient and useful. People *ex rel.* Green *v.* Dutchess, etc., R. Co., 58 N. Y. 152. Also to compel it to build a bridge. People *v.* Boston & A. R. Co., 70 N. Y. 569; State *v.* Gorham, 37 Me. 451; Cambridge *v.* Charlestown B. R. Co., 7 Met. 70. Also to compel it to construct and maintain fences and guard. People *v.* Rochester, etc., R. Co., 14 Hun, 317, 76 N. Y. 294. Also to compel it to construct its road across streams, so as not to interfere with navigation. State *v.* Northeastern R. Co., 9 Richardson (S. Car.), 247. Also to compel it to deliver to a particular elevator grain consigned thereto in bulk. Chicago & N. W. R. Co. *v.* People, 56 Ill. 365. Also to compel the running of the trains to the terminus of the road. State *v* Hartford, etc., R. Co., 29 Conn. 538. Also to compel it to operate its road as one continuous line. Union Pac. R. Co. *v.* Hall, 91 U. S. 343 (bk. 23, L. ed. 428); Hall *v.* Union Pac. R. Co., 3 Dill. 515; United States *v.* Union Pac. R. Co., 4 Dill. 479. Also to compel it to re-establish an abandoned station. State *v.* New Haven, etc., Co., 37 Conn. 154. Also to compel the replacement of a track taken up in violation of its charter. King *v.* Severn & W. R. Co., 2 Barn. & Ald. 646. Also to compel a bridge company to repair and construct a bridge in conformity with its charter. State *v.* Wilmington Bridge Co., 3 Harr. (Del.) 312. Also to compel a water-power company to build bridges over its canals, although not required by its charter. *Re* Trenton W. P. Co. 20 N. J. L. 659. Also to compel a dock company to maintain a channel. Regina *v.* Bristol Dock Co., 2 Q. B. 64. Also to compel a gas company to furnish gas. People *v.* Manhattan G. L. Co. 45 Barb. 136; City *v.* St. Louis Gas Co., 70 Mo. 69, 117. Also to compel a commissioner of a land-office to issue a certificate for lands to which corporation may be entitled. Houston & Gt. N. R. Co. *v.* Kuechler, 36 Tex. 382. Also to compel county officers to levy a tax on the county, to satisfy a judgment rendered on bonds issued as provided by law. Riggs *v.* Johnson Co. 6 Wall. 166 (73 U. S., bk. 18, L. ed. 768); Mayor *v.* Lord, 9 Wall. 409 (76 U. S. bk. 12, L. ed. 704). Also to compel a corporation to keep a register and insert therein the names of the stockholders. Norris *v.* Irish Land Co., 8 El. & Bl. 525. Also to compel a railroad or a canal company to build or repair its road or canal. People *v.* Troy, etc., R. Co. 37 How. Pr. 427. Also to compel a railroad company to receive and transport freight. People *v.* N. Y. Cent. & H. Riv. R. Co., 28

Hun, 543, 30 Hun, 78. Also to compel a railroad company to perform any duty toward the public. People *v.* Albany, etc., R. Co., 24 N. Y. 261, 267, 269; Railroad Comrs. *v.* Portland, etc., R. Co., 63 Me. 269; McCoy *v.* Cincinnati, etc., R. Co., 13 Fed. Rep. 373; Talcott *v.* Pine Grove, 1 Flippin, 145.

It may be added that the Mattoon case, *supra*, is now pending before the United States Supreme Court, as we are informed, and its decision will probably determine finally and definitely the rights of the State in this regard, and the corresponding duties of railway companies.

GRAY

v.

N. Y. & NEW ENG. R. CO. AND BOROUGH OF DANBURY.

(*Advance Case, Connecticut. February* 26, 1887.)

Where a railroad company built a bridge over a highway, and was itself guilty of no negligence, and the bridge was built upon such plans and at such height as the borough required, the company is not bound to prevent the highway from being raised, nor to preserve the original space between it and the bridge.

Where the borough was negligent in causing or permitting the roadway under the bridge to be filled up till the space under it was too small to satisfy the requirements of common convenience and necessity, the railroad company is not liable for the damages received by one coming in collision with the bridge by reason of its height being thus practically reduced.

The statutes (Rev. Stat. 323, 324, §§ 28, 30) do not require the railroad company to maintain the highway under the bridge so as to prevent the bridge from interfering with public travel.

Rev. Stat. 232, § 10, does not make the company liable in a case like this, where the injury resulted from the negligence of the party bound to keep the highway in repair.

APPEAL from a judgment of the Fairfield superior court in favor of plaintiff, in an action to recover for damages sustained through the alleged negligence of defendants. Affirmed.

The action was brought against the New York & New England R. Co. and the borough of Danbury. The facts were found by the court, Andrews, J., and judgment rendered against the borough for substantial damages, and against the railroad company for nominal damages only, whereupon the plaintiff and the borough appealed to this court.

The facts are fully set out in the opinion.

Goodwin Stoddard, William D. Bishop, Jr., David B. Booth, and *H. W. Taylor* for the borough of Danbury, defendant, appellant.

Brewster, Tweedy & Scott for plaintiff, appellant.

Robert E. DeForest and *James E. Walsh* for New York & New England R. Co., defendant, appellee.

CARPENTER, J.—Action against the borough of Danbury and the New York & New England R. Co., to recover for injuries received by coming in collision with a railroad bridge over the highway. Hearing in damages upon default: judgment against the borough for actual damages, and against the railroad company for nominal damages only. The borough and the plaintiff appealed. Each appeal presents this question, Is the railroad company liable for actual damages? The material facts are briefly these: In 1880 the railroad company constructed a bridge over West street in said borough, for the purpose of carrying the railroad over the street. The plaintiff was guilty of no contributory negligence. It is expressly found that the railroad company was guilty of no negligence. The bridge was built "upon plans or directions furnished or approved by the borough," and was put at such height above the street as the borough required. When first built the vertical space between the bridge and the roadbed was 10 feet 6 inches; when the accident happened it was 9 feet and 4 inches. The difference, 14 inches, was caused by raising the roadbed from year to year, partly from natural causes, and partly from placing gravel thereon by those repairing the street. Therein the court found the borough guilty of negligence. The finding is conclusive in favor of the railroad company, unless the court can see as a conclusion of law, from the facts stated, that the company was negligent. The supposed negligence consists either in a faulty construction of the bridge, or in failing to take measures to preserve the original space between the bridge and the street. FACTS.

1. Was there negligence in the construction of the bridge? It may be that 10½ feet is in fact scant height for a railroad bridge over a highway; but are we justified in saying so, as a legal conclusion. We are aware of no law, statute or otherwise, that fixes the height of such bridges. They should be constructed so as reasonably to accommodate the public travel. What is reasonable must depend in some measure upon the circumstances of each particular case. It seems that the railroad company, its engineers, and the railroad commissioners deemed the height sufficient; otherwise it would have been their duty to insist upon its being greater. The borough, in view of its liability for the highway, insisted that the bridge should be built according to its wishes, which was done. The borough then considered the height sufficient. In addition to this, the fact appears that the injury was caused, not by the bridge being too low in the first instance, but by reason of the height being practically reduced by raising the street. These facts, we think, justify the superior NEGLIGENCE IN BUILDING BRIDGE.

court in finding that the company was not negligent in constructing its bridge.

2. Was it negligent in failing to keep the vertical space at its original height?

That could only be done in one of two ways; by raising the bridge, or by preventing the accumulation of earth upon the roadbed. Surely it will not be claimed that the company was bound to raise the bridge as the street was raised from year to year. To impose upon it such a duty would be unreasonable.

SAME—SPACE LEFT UNDER BRIDGE.

Neither was the company bound to prevent the street from being raised. The duty of repairing the street was on the borough. The company was under no obligation to see that the borough did its duty, and it had no power to control the manner of doing it.

Any attempt to remove the earth and gravel placed there by the borough would have been an unwarrantable interference with its rights and duties. The borough alone could make repairs, and it alone should be responsible for doing it improperly. The court below was justified in finding that "the said borough was negligent in causing or permitting the roadway under said bridge to be filled up till the space under it was too small to satisfy the requirements of common convenience and necessity."

But it is claimed that the railroad company is liable by statute. Two sections are cited as bearing upon the case. Rev. Stat. p. 323, § 28, and p. 324, § 30. The twenty-eighth section has more particular reference to grade crossings and cases where the location of the highway is changed in order that the railroad may be laid in the most feasible place.

The thirtieth section is the one more particularly relied on. It provides that the railroad company "shall make and maintain such bridges, abutments, tunnels, arches, excavations, embankments, and approaches, as the convenience and safety of the public travel upon said turnpike, highway, or street may require," etc. It seems to be claimed that under this statute the railroad company was bound to maintain the highway under the bridge, at least so far as to prevent the bridge from interfering with public travel. We think this is a strained and unnatural construction of this section. No word in it aptly describes this piece of road, and the whole section falls far short of imposing upon the company any such duty.

In this connection it was urged by counsel for the borough, that "whatever additional burden of repair the presence of the bridge might demand, should be assumed by the railroad company for whose benefit the bridge was constructed. The state of repair in which the roadbed was, at the time of the accident in question, would in former times have been ample; if it was inadequate when the accident occurred, it was solely because of the presence of the bridge above it. . . . This is an expense rendered necessary by the

presence of the bridge solely." This is plausible, but it is reasoning from false premises. It assumes that it was more expensive to maintain the road at its former grade than to raise it up, whereas the reverse was doubtless true. It also assumes that the inadequacy of the highway was "solely because of the presence of the bridge," whereas the finding clearly shows that the bridge was harmless and would have remained so if the borough had done its duty properly.

It is not to be inferred, however, that the presence of a railroad will in no case impose additional burdens upon towns in maintaining highways. It may well be that their duties in that behalf will be changed or modified, and that they will be somewhat restricted in the use of means, as in this case. Such modifications may involve some additional expense, which the towns may reasonably be required to bear.

It is further claimed that Rev. Stat. p. 232, § 10, which makes the party bound to keep a highway in repair liable in damages caused by any defect therein, makes the company liable under the concluding clause of that section, which is: "And when the injury is caused by a structure legally placed on such road by a railroad company, it, and not the party bound to keep the road in repair, shall be liable therefor."

We cannot suppose that the legislature intended to make the company liable in a case like this, where the structure is a bridge suspended over the highway, and the accident clearly resulted from the negligence of the party bound to keep the highway in repair.

Counsel for the borough also raise a question of evidence. It is insisted that the testimony on which it is found that the borough, at the time of the erection of the bridge, in view of its liability for the highway, insisted that the bridge should be built according to its wishes, and it was so done,—was inadmissible.

We are not satisfied that the statute which requires the record to show that the question was distinctly made on the trial has been complied with. A large number of votes of the borough and of the warden and burgesses were offered in evidence by the plaintiff and objected to by the borough.

Most of these votes were offered for other purposes; and so far as those purposes are concerned the objection is not pursued. Among those votes was one passed by the warden and burgesses, January 19, 1880, as follows: "Voted, that the board approve of the doings of the New York & New England R. Co., in building a bridge across West street." That has some tendency to establish the facts objected to; but it does not appear that the objection to the evidence was for that reason; and it cannot be presumed, for, in addition to the fact that it was offered for another purpose, and by the plaintiff, the record discloses no attempt by the plaintiff to show that the railroad company was not liable.

But aside from this the facts must have been found mainly on

other evidence. What that evidence was does not appear; neither does it appear that it was objected to.

There was no error.

In this opinion the other judges concurred.

Low Bridge.—See Riley *v.* Conn. River R. Co., 15 Am. & Eng. R. R. Cas. 181; Clark *v.* Richmond, etc., R. Co., 18 Ib. 78; Sweeney *v.* Chicago, etc., R. Co. 20 Ib. 268.

Obstruction of Highway by Bridge.—See McCune *v.* Northern Pac. R. Co., 15 Am. Eng. R. R. Cas. 171.

Railroad—Construction of Bridge over Highway.—The provision in the charter of the Androscoggin R. Co., that "the railroad shall be so constructed as not to obstruct the safe and convenient use of the highway," is a continuing obligation, requiring the company to keep the railroad so constructed at all times. Welcome *v.* Inhabitants of Leeds, 51 Me. 313. A railroad company must, if possible, construct their road without any inconvenience to the public; but if this cannot be done, it must be constructed with the least possible inconvenience. If a bridge or substituted road be necessary to prevent the obstruction, the company must build it in a reasonable time, and cannot delay it until their road is completed. Louisville, etc., R. Co. *v.* State, 3 Head (Tenn.), 523.

A railroad corporation, constructing their railroad across a highway without lawful authority, are liable to indictment for a nuisance. Commonwealth *v.* Vermont, etc., R. Co., 4 Gray (Mass.), 22; Roe *v.* Elmendorf, 52 How. Pr. (N. Y.) 232; Hayes *v.* N. Y. Cent. R. Co., 9 Hun (N. Y.), 63.

HAMILTON

v.

VICKSBURG, SHREVEPORT AND PACIFIC RAILROAD.

(119 *United States*, 280.)

Whenever the exercise of a right, conferred by law for the benefit of the public, is attended with temporary inconvenience to private parties, in common with the public in general, they are not entitled to damages therefor.

A railroad company was authorized by the legislature of Louisiana to construct a railroad across that State, and as part of such road to construct necessary bridges for crossing navigable streams. The act made no provision for the form or character of such structures. A bridge across a navigable stream was constructed with a draw. In process of time it became decayed, and defendant in error, having succeeded to the rights of the company, employed a contractor to construct a new bridge in its place, the work to be done at a time of the year when it would least obstruct navigation. The contractor complied with his contract as to the time; but owing to unusual rains the river continued navigable, and the work was unavoidably prolonged, thereby obstructing its navigation and preventing the vessels of plaintiff in error

from passing beyond the bridge. *Held*, that this was a case of *damnum absque injuria*.

Escanaba Co. *v.* Chicago, 107 U. S. 678, and Cardwell *v.* American Bridge Co., 113 U. S. 205, affirmed and applied.

ERROR to the supreme court of the State of Louisiana. Argued November 10, 1886.—Decided December 6, 1886.

The case is stated in the opinion of the court. The case in the court below will be found reported in 34 La. Ann. 973.

John T. Ludeling for plaintiff in error.

George Hoadly, Jr., *George Hoadly*, *Edgar M. Johnson*, and *Edward Colston* were on the brief.

FIELD, J.—The authority vested by its act of incorporation in the Vicksburg, Shreveport, & Texas R. Co. to construct a railroad from a point opposite Vicksburg to the state line of Texas, empowered it to construct as part of the road all necessary bridges for the crossing of navigable streams, which might be on its line. It was so held by the supreme court of the State of Louisiana, and it would seem to be a self-evident proposition. What the form and character of the bridges should be, that is to say, of what height they should be erected, and of what materials constructed, and whether with or without draws, were matters for the regulation of the State, subject only to the paramount authority of Congress to prevent any unnecessary obstruction to the free navigation of the streams. Until Congress intervenes in such cases and exercises its authority, the power of the State is plenary. When the State provides for the form and character of the structure, its directions will control, except as against the action of Congress, whether the bridge be with or without draws, and irrespective of its effect upon navigation. FACTS.

As has often been said by this court, bridges are merely connecting links of turnpikes, streets, and railroads; and the commerce over them may be much greater than that on the streams which they cross. A break in the line of railroad communication from the want of a bridge may produce much greater inconvenience to the public, than the obstruction to navigation caused by a bridge with proper draws. In such cases, the local authority can best determine which of the two modes of transportation should be favored, and how far either should be made subservient to the other. Gilman *v.* Philadelphia, 3 Wall. 713, 729. NATURE OF BRIDGES.

In the case at bar, no specific directions as to the form and character of the bridges over the streams on the line of the railroad were prescribed by the legislature of the State. The authority of the company to construct them was only an implied one, from the fact that such structures were essential to the continuous connec-

tion of the line. Two conditions, however, must be deemed to be embraced within this implied power; one, that the bridges should be so constructed as to insure safety to the crossing of the trains, and be so kept at all times; and the other, that they should not interfere unnecessarily with the navigation of the streams.

The line of road crossed a small stream, one of the tributaries of the Ouachita river, called Bouff river, which was navigable for about six months in the year. This river has its rise in the Arkansas, and by its connection with the Ouachita, which empties into Red river, its waters find their way to the Mississippi. Over this river, the company constructed a bridge with a draw sufficiently large to allow the passage of steamers. It was used for years without complaint from any one, so far as the record discloses. But in 1880, it was found, upon inspection, to be decayed and unsafe for the passage of trains. The defendant, which had succeeded to the property and interests of the Vicksburg, Shreveport & Texas Co., therefore determined to rebuild it. To carry out this purpose with as little inconvenience as practicable to vessels navigating the river, the company contracted with an experienced builder to construct the bridge during the summer months, when the river was usually too low for navigation. The work could not be begun until the subsidence of the water in July. In order to expedite its construction, the company stipulated with the contractor to prepare the timbers at its workshops and transport them to the ground as soon as the state of water would permit the work to be commenced; and it carried out its stipulation in that respect. In the construction of the new bridge it became necessary to dismantle the draw of the old one, and to erect temporary supports while the timbers and draw of the new bridge were being put in place. To prevent the stoppage of its trains while this building was going on, the company constructed a temporary bridge adjoining the old one, for their transportation, expecting to have the new bridge completed before the winter rise, which usually began near the close of December, should render the river navigable. But, early in August, rains set in, and continued almost incessantly for months, rendering the river navigable in November, much earlier than usual. The work on the new bridge was thereby greatly impeded. To obviate this impediment, as far as possible, the company added to the contractor's force a gang of its own bridge laborers, who assisted by working at night and on Sundays.

The court below found that the company did everything in its power to accelerate the work on the new bridge, but it was not completed until December 20 following. The water in the river being increased by the unusual rains, there was sufficient depth on the 6th of November to carry the plaintiff's steamer with freight above the bridge. But the steamer could not pass owing to the temporray structure and the supports used in the erection of the

new bridge. For the losses alleged to have been sustained from this obstruction between the 6th of November and the 20th of December the plaintiff brought this action.

The district court of Louisiana gave judgment for the plaintiff in the sum of one thousand dollars, from which both parties appealed to the supreme court of the State—the plaintiff because he did not recover as much as he claimed, and the defendant because there was a recovery of any sum. The supreme court reversed the judgment, holding that the company was authorized by the charter of the original company, to which the defendant had succeeded, to construct a bridge over the river for the passage of its trains, and, when out of repair and decayed, to replace it with a new one; that the obstruction to navigation caused by the construction of the new bridge was unavoidable, and the company could not, therefore, be held responsible for any injury resulting therefrom; that it was a case in which the defendant was entitled to the protection of the rule of *damnum absque injuria*. It accordingly reversed the judgment, and ordered that the action be dismissed.

The plaintiff contends, that Congress had previously acted with respect to the navigation of this river and of all other navigable waters in Louisiana, and had thereby interdicted the placing of any obstruction in them, even of a temporary character, to the passage of vessels. He cites in support of this position the act of February 20, 1811, enabling the people of the Territory of Orleans to form a constitution and state government, the third section of which enacted that the convention called to frame the constitution should, by an ordinance, irrevocable without the consent of the United States, provide, among other things, "that the river Mississippi and the navigable rivers and waters leading into the same or into the Gulf of Mexico, shall be common highways and forever free, as well to the inhabitants of the said State as to other citizens of the United States without any tax, duty, impost, or toll therefor, imposed by the said State," 2 Stat. 642, and also the proviso to the act of April 8, 1812, for the admission of Louisiana, which declares that it is upon a similar condition that the State is incorporated into the Union. 2 Stat. 701, § 1.

PREVIOUS ACTION OF CONGRESS CONSIDERED.

A similar provision is found in the acts admitting the States of California, Wisconsin, and Illinois into the Union, with respect to the navigable rivers and waters in them, the purport and meaning of which have been the subject of consideration by this court. Escanaba Co. *v.* Chicago, 107 U. S. 678, and Cardwell *v.* American Bridge Co., 113 U. S. 205. In the latter case, we had before us the clause in the act admitting California, and we held that it did not impair the power which the State could exercise over its rivers, even if the clause had no existence. We there referred to previous decisions upon a similar enactment, and said "that if we treat the

clause as divisible into two provisions, they must be construed together as having but one object, namely, to insure a highway equally open to all without preference to any, and unobstructed by duties or tolls, and thus prevent the use of the navigable streams by private parties to the exclusion of the public, and the exaction of any tolls for their navigation; and that the clause contemplated no other restriction upon the power of the State in authorizing the construction of bridges over them, whenever such construction would promote the convenience of the public."

The objection to the authority conferred upon the company to construct the bridge, from the legislation of Congress, is, therefore, not tenable; and we agree with the ruling of the court below that, whenever the exercise of a right, conferred by law for the benefit of the public, is attended with temporary inconvenience to private parties, in common with the public in general, they are not entitled to any damages therefor. The obstruction caused to the navigation of the stream during the progress of the work on the new bridge, therefore, afforded no ground of action. The inconvenience was *damnum absque injuria*. Bennett *v.* City of New Orieans, 14 La. Ann. 120; Barbin *v.* Police Jury of Avoyelles, 15 La. Ann. 559.

Judgment affirmed.

Water Course Obstructed by Bridge.—See Abbott *v.* Kansas City, etc., R. Co., 20 Am. & Eng. R. R. Cas. 103; Omaha, etc., R. Co. *v.* Brown, 20 Ib. 286; Hughes *v.* Northern Pac. R. Co., 18 Ib. 157; Crouch *v.* Railway Co., post, 495.

Obstruction of Navigation of Vessels in Rivers.—Corporations or public officers are not authorized to obstruct the navigation of a river, under a legislative grant of power, merely for the building of a bridge across a river, where the bridge can reasonably be constructed so as not to destroy the navigability of the river. Simeon Hickok *et al. v.* Hine, 23 Ohio St. 523; Where a corporation is authorized by its charter to construct a dam in a river, provided the same be "so constructed as to leave the channel of the river as safe and convenient for the descent of rafts as it now is," such proviso is to be construed to mean that the dam shall be so constructed as to be the least obstruction to the navigation of the river consistent with the uses of the dam for the purposes contemplated by the charter. Whitaker *v.* Delaware & Hud. Canal Co., 87 Penn. St. 34. Where by the charter of a railroad company said company is authorized to build a bridge over a navigable stream, with the proviso that the navigation of said stream shall not be thereby obstructed, it is held that a temporary obstruction, such as the necessary framework and scaffolding used in the erection of said bridge, is an obstruction within the meaning of the charter for which the company would be liable to a person damaged thereby. Memphis & Ohio R. Co. *v.* Frank Hicks *et al.*, 5 Sneed (Tenn.), 427. A party who suffers injury from a public nuisance, e.g., in having his raft, boat, or barge stopped by the building of a railroad bridge across a navigable stream, may have his action agains the nuisancer for damages. Little Rock, Miss. River & Texas R. Co. *v.* Brooks *et al.*, 39 Ark. 403; Mellen *et al. v.* West R. Corp., 4 Gray (Mass.), 301.

Crouch

v.

Charleston and Savannah R. Co.

(21 *South Carolina*, 495.)

Contributory negligence is a matter of defence, and the burden of proving it is on defendant. It is not necessary, therefore, that the plaintiff should allege in his complaint that he exercised due care.

Knowledge that there are defects in a draw to a bridge does not relieve the owners of the bridge from all responsibility. And so, where a steamer had several times passed through such a draw without injury, but on one occasion was injured while passing through with proper care, in action for damage for such injury, the judge properly refused a nonsuit.

The failure of the steamer to "drop anchor and drag through," as is required of boats, etc., passing under a bridge (Gen. Stat., § 1115) does not affect this case.

Action by H. W. Crouch and others against the Charleston & Savannah R. Co. Before Witherspoon, J., Charleston, November, 1883. The opinion states the case.

Brawley & Barnwell for appellants.

Lord & Inglesby for appellees.

McGowan, J.—The plaintiffs are the owners of the steamer "Silver Star." The defendant is a chartered corporation, with the power to conduct their railroad across any river, Facts. creek, waters, or water-courses that may be in their route from Charleston to Savannah, provided that the navigation of the stream be not obstructed thereby. Under the charter a bridge was constructed across the Ashley river, a navigable stream.

The complaint alleged that the defendant, since June 7, 1880, has unlawfully kept and continued the said bridge across the Ashley, with an improperly constructed draw therein, and has thereby obstructed and continued to obstruct the navigation of said river. That on September 27, 1882, while the steamer of the plaintiffs was proceeding upon the said river, she struck upon and against the said bridge, and thereby received injury to the amount of two thousand dollars. The answer of defendant denied each and every allegation of the complaint not specifically admitted, but admitted it to be true that on the day named, September 27, 1882 the plaintiffs' steamer, known as the "Silver Star," did receive certain injuries in passing the said bridge, but insisted that the same was caused by the negligence and want of care of the

persons in charge of the steamer, in not taking the proper precaution while passing the bridge.

At the trial the defendant corporation demurred orally that the complaint did not state facts sufficient to constitute a cause of action, which demurrer was overruled and the trial proceeded with. The testimony submitted by the plaintiffs tended to show that the draw was not properly constructed, or of sufficient width to enable vessels to pass through in safety; that the injury occurred in the afternoon of a fair day, and that, in attempting to make the passage, every possible precaution was taken by the officers of the boat to avoid accident. There was no testimony offered to rebut this proof, but the defendant seemed to rely upon the general proposition that the improper construction of the draw was apparent, and being known to the officers of the boat, the effort to pass through should not have been made, and to do so amounted to want of proper care or negligence upon their part. It appears that the steamer "Silver Star" had, in pursuing her business, frequently passed through this draw-bridge without injury, and that complaints had been made to the defendant of the improper construction and narrowness of the draw.

The defendant moved for a nonsuit, which was refused, and the jury rendered a verdict for the plaintiffs for $1158.

The defendant appeals to this court: I. From the ruling of the judge, in refusing to sustain the demurrer and dismiss the complaint, upon the grounds—1. "Because the complaint does not state that the plaintiffs were in the exercise of ordinary care in passing defendant's bridge. 2. Because it does not state facts, from which it might be inferred that the plaintiffs were in the exercise of ordinary care in so passing the bridge." II. The defendant also appeals from the order of the judge refusing a motion for nonsuit on these grounds: 1. "That plaintiffs' testimony showed that in passing said bridge they were doing what prudent men would not attempt under similar circumstances, and were therefore not in the exercise of ordinary care. 2. Because plaintiffs' testimony showed that they did not drop anchor and drag through defendant's bridge as required by law," etc.

First, as to the demurrer. It is true that in actions like this for damages on account of alleged negligence, great consideration is given to the question of contributory negligence on the part of the plaintiff. In a majority of the cases probably, the conduct of the plaintiff is interposed in answer to the charge of negligence on the part of the defendant; but the better view seems to be, that the conduct of the plaintiff is not a necessary element in his cause of action and to be alleged by him; but a defence to be alleged and proved by the defendant. In pleadings under the code, great clearness and

DEMURRER—CONTRIBUTORY NEGLIGENCE.

simplicity are required, surplusage being regarded as a vice. The complaint must only state "the facts which are the occasion for the primary right and duty to arise, and those which form the breach of such right and duty, to the entire exclusion of the other elements that enter into the cause of action, the legal rules, and the legal rights of the parties," etc. Pom. Rem. § 524.

This court has held in the recent case of Carter *v.* C. & G. R. Co., 10 S. Car. 28, that contributory negligence is a matter of defence and the burden of proving it is with the defendant. We think it follows from the onus of proof being on the defendant, that it is not necessary for the plaintiff to make the allegation of due care in his complaint, and thus anticipate the defence. "Where contributory negligence is mere matter of defence, a complaint or declaration will not be held bad solely because it omits an allegation that the plaintiff or person injured was without fault. . . . It is not necessary for the plaintiff to aver due care on his part, in order to introduce proof of it." 2 Thomp. Neg. 1178, in the notes. We think there was no error on the part of the circuit judge in refusing to sustain the demurrer.

Second, as to the nonsuit. Assuming that it was incumbent upon the defendant to make out a case of want of proper care on the part of the plaintiffs, we think that the testimony on the subject tended to show that all possible care was taken in passing the draw; at least that it was quite sufficient to require the judge to submit the question to the jury. Indeed, proper care of the officers in passing the draw does not seem to have been questioned, but the general ground was taken that the defects of the bridge were so obvious, and so well known to the officers of the steamer, that the effort, under the circumstances, to pass at all, was itself clear proof of want of proper care upon their part—so clear that the judge upon that ground should have ordered a nonsuit. We cannot accept the view that the knowledge of the defects on the part of the officers should relieve the defendant from all responsibility. Such knowledge was entitled to proper consideration, but to make it conclusive against the injured party would be to give primary importance to a secondary consideration, and to absolve the wrong-doer for the very reason that his wrong was so great and apparent that it was known by all. The greater the obstruction, the more certain immunity from its consequences! that is to say, to give the obstructor advantage of his own wrong.

It is true that no one is justified in wantonly throwing himself against an obvious and impassable obstruction, and such conduct clearly proved would prevent a recovery for an in injury thereby produced; but we do not see that such failure could cure the original wrong of the obstructor. Besides, in this case, experi-

ence had shown that it was possible to pass through the defective draw without injury, as the "Silver Star" had done many times before. The plaintiffs were engaged in business, which made it necessary to navigate the Ashley river. They had a right to do so unobstructed, and the defendant corporation had no right to place such obstructions across the river as required them, for fear of injuries, to give up the navigation and their business. The doctrine contended for would certainly put the navigation of the river at the mercy of the defendant corporation.

We think the proper doctrine on the subject was announced in a late Maryland case, County Commissioners of Prince George *v.* Burgess, (Md.) 17 Reporter, 245, February, 1884, in which Judge Irving, in delivering the judgment of the court, said: "It is well settled in this State that the burden of showing contributory negligence on the part of a plaintiff is on the defendant. Bacon's Case, 58 Md. 484. This rule has been laid down in suits against railroads for injuries occasioned by them; and we see no reason for establishing a different rule as applied to accidents occasioned by defective county roads and bridges. The presumption that a man will act prudently and with care for his own safety, and will not recklessly rush into destruction, must exist as well in one case as in the other. In this case it is argued that because the evidence showed that the plaintiff knew of the condition of the bridge, therefore the burden shifted, and it was incumbent on him to show affirmatively that he used due care and prudence in driving. It is wise for a plaintiff shown to know of a defect, to prove that he drove with caution (that was shown in this case); but we cannot accede to the view that the onus of showing want of care rests anywhere but on the defendant. If the bridge was wholly impassable and the plaintiff knew it, his knowledge would be conclusive, and the case might have been taken from the jury. In this case it does not appear from the proof that the bridge was wholly impassable. It was unsafe and had a hole in it, into which appellant's horse fell and was injured. The simple fact of its existence, with the knowledge of the plaintiff, was not sufficient to bar recovery. The hole might possibly have been avoided with ordinary care in driving, and the knowledge of its existence ought to have prevented carelessness on the part of the plaintiff, and naturally would have induced care on his part; but the onus of showing that such care and prudence were not exercised still rested on the defendants. The case of Reed *v.* Northfield, 13 Pick., 94, is very similar to this case. There was a dangerous hole by the side and edge of the bridge, of which the plaintiff had knowledge. He crossed the bridge, and in doing so his horse got into the hole and was seriously injured. The jury was instructed that the knowledge of the hole being there was not conclusive

evidence of negligence. On appeal Chief Justice Shaw, pronouncing the decision of the court, said that the ruling was perfectly correct. See Horton *v.* Ipswich, 12 Cush. 492, etc. The doctrine to be extracted from all these cases is, that if the defect in a road or bridge be such as to make the same practically impassable, a person takes all the hazard who, with such knowledge, attempts to pass over the road or bridge, and will not be redressed if he is injured. But if the defect be one which does not render the road wholly unfit for use, or bridge substantially impassable, and is only a defect which might result injuriously if not shunned, in such case it cannot be that a citizen with business must remain at home and may not make any attempt to use the road or bridge as his necessity requires," etc.

Section 1115 of the General Statutes, under the head of "Bridges," provides that "All vessels, boats, and rafts passing under any bridge shall, before they come to the same, drop anchor and drag through under the same; and if any vessel, boat, or raft shall pass, or attempt to pass, under any bridge without dragging as aforesaid, every such vessel, boat, or raft shall forfeit the sum of fifty dollars, to be recovered by immediate seizure and detention of the said vessel, boat, or raft, until the payment of the said sum, by information being given of the same to the circuit court in the county where the offence was committed; the money, when so recovered, to be applied for rebuilding or keeping in repair such bridge," etc. This is not a proceeding to recover the penalty imposed by this section, which we do not think has any application to the case. This is a private bridge with a draw to it defectively constructed. The difficulty was not in getting under the bridge, but through it. There was no evidence that in passing the draw it was customary, or would have been attended with less danger to the vessel, to "drop anchor and drag through."

The judgment of this court is that the judgment of the circuit court be affirmed.

Defective Construction of Bridge.—See Mo. Packet Co. *v.* Hannibal, etc., R. Co., 20 Am. & Eng. R. R. Cas. 215; Omaha, etc., R. Co. *v.* Brown, 11 Ib. 501.

INTERNATIONAL AND GREAT NORTHERN R. CO.

v.

KLAUS.

(64 *Texas*, 293.)

When one issue was, whether a bridge constructed by a railroad company across a stream had been so unskilfully constructed as to cause the waters of the stream to overflow, unskilled witnesses familiar with the bridge structure and the facts connected with the overflow were permitted to give their opinion as to whether the bridge, on account of being improperly constructed, caused the damage, and to state in that connection the facts within their knowledge.

See opinion for facts under which it was held that a judgment against a railway company for damages, alleged to have been caused by the overflow of land in consequence of its bridge being improperly constructed, was error.

APPEAL from Comal. Tried below before the Hon. Thomas M. Paschal.

The appellee sued to recover for damages caused to his land by the defective construction of appellant's bridge, whereby it was alleged an overflow of the stream resulted, which inundated and destroyed his growing crops. Verdict and judgment for $350. Non-professional witnesses were permitted to testify as to their opinion of the want of proper skill in the construction of the bridge, and this was assigned as error.

J. D. Guinn for appellant.

W. R. Neal for appellee.

DELANY, J., Com. App.—Although there are sixteen assignments of error, there are only two or three questions to be determined.

The plaintiff's land was overflowed and his crops and fences swept away. He charges this to the defendant's bridge, which, FACTS. he alleges, was defectively constructed; that it was so built as not to allow the floating trees, drift, etc., to pass under it; that the channel of the stream was thus obstructed, causing the water to rise above its natural level and overflow the land.

The plaintiff introduced a number of witnesses who had lived many years near the stream, who were familiar with the usual rainfall of the region. They stated that, after heavy rains, torrents of water rushed down the channel, bearing timber, trees, and drift in great quantities. They then stated that, in their opinion, the openings of the bridge were not large enough to permit the passage of the drift.

The defendant objected to the evidence, and has made it the subject of several assignments of error. The objection is that these witnesses were not men of science and skill in the matter of bridge building, and hence should not have been permitted to give opinions. 1 Greenl. Ev., sec. 440. Ordinarily, witnesses must state facts only, except in certain cases in which persons of skill and learning may give their opinions. There are, however, many cases in which unskilled witnesses may give their opinions; and there is still another class of cases in which they may do so when they give, along with the opinions, the facts on which they are founded. A collection of these cases will be found in 1 Whart. on Ev., sec. 512, note 10. EXPERT TESTIMONY CONSIDERED.

The case of Porter *v.* Mfg. Co., 17 Conn. 249, resembles very much the one before us. In that case, witnesses who had long been familiar with a particular region, its streams and the rainfall, were permitted to give their opinions upon the question whether a dam across a stream had not been raised so high as to be unsafe. The court said: "The opinions of such persons upon a question of this description, although possessing no peculiar skill upon the subject, would ordinarily be more satisfactory to the minds of the triers than those of scientific men who were personally unacquainted with the facts of the case. And to preclude them from giving their opinions on the subject, in connection with the facts testified to by them, would be to close an ordinary and important avenue to the truth. . . . On such a question, the judgment of ordinary persons having an opportunity of personal observation, and testifying to the facts derived from that observation, was equally admissible, whatever comparative weight their opinions might be entitled to, of which it would be for the jury to judge." See, also, College *v.* McHugh, 21 Tex. 256; Carroll *v.* Welch, 26 Tex. 147. The court, we think, did not err in admitting the evidence.

But a more serious question arises when we come to consider whether the evidence is sufficient to support the verdict. Can it fairly be inferred from the evidence that the presence of the bridge caused the overflow of the plaintiff's land? We will not stop to inquire whether the flood was one so extraordinary that the defendant ought not to have been held bound to anticipate and provide against it. After a careful examination of the evidence we cannot see any reason to believe that the bridge contributed in any material degree to the plaintiff's losses. From the plaintiff's own testimony the level of his field was more than five feet below the level of the top of the bridge. The engineer, Lucas, who made the plot, says the difference of level was more than eight feet. Only two persons saw the bridge on the night of the flood, for it lasted only a few SUFFICIENCY OF EVIDENCE TO SUPPORT VERDICT.

hours. One of these was the plaintiff's witness, Marchardt. When he visited the bridge the water was within two feet of the top and rising rapidly. It was passing without obstruction through the bridge, and was as high below as above it. Thus at that time it was more than three feet deep in the plaintiff's field, according to his testimony, and according to Lucas its depth must have been more than six feet. This was some time before the bridge fell, and the witness says that the water continued to rise rapidly until the crash came.

Hood, a witness for the defendant, watched the bridge most of the night. He was near it and saw it when it fell. The water rose rapidly, passing under it without obstruction until it reached the top, when the structure gave way and was swept down the stream. The other testimony was not inconsistent with the statement of these witnesses, and in the whole record we find little or nothing to indicate that the plaintiff was injured by the presence of the bridge. There is no proof whatever that the stone fence was broken by the floating timbers after the bridge had fallen. Reluctant as we are to interfere with the verdict of a jury, we feel constrained to recommend that the judgment be reversed and the cause remanded.

Reversed and remanded.

Obstruction of Natural Flow of Watercourse.—See Salisbury v. Western N. C. R. Co., 29 Am. & Eng. R. R. Cas., *ante*.

HILL *et al.*

v.

CINCINNATI, WABASH AND MICHIGAN R. CO.

(*Advance Case, Indiana. February* 16, 1887.)

A watercourse is a stream of water ordinarily flowing in a certain direction, through a defined channel with bed and banks. Its flow need not be continuous and its channel may sometimes be dry, but there must always be substantial indications of a stream which is ordinarily and most frequently a moving body of water; and a railway company will be liable if by its embankment it causes such a natural watercourse to be obstructed, to the injury of the owner of adjacent lands.

A channel made by mere surface water and snow is not a watercourse, unless there is ordinarily and most frequently a moving body flowing through it. Such falling rain and melting snow constitute surface water, which the owner of land upon which it accumulates may drain into a natural watercourse through his own land, or which he may by proper legal proceedings

have carried through the adjoining land of others; but a railroad company is not answerable in damages for the obstruction of the flow of such surface water.

There is no error in giving as instructions abstract legal propositions which correctly state the law, where there is evidence to which the instructions as given are applicable.

APPEAL by the plaintiffs from a judgment of the Grant circuit court in favor of the defendant, in an action for injury to real estate by obstructing a watercourse. Affirmed.

The facts are stated in the opinion.

John A. Kersey and *L. D. Baldwin* for appellants.

C. E. Cowgill for appellee.

NIBLACK, J.—Action by Joseph W. Hill and Zimri S. Richardson against the Cincinnati, Wabash & Michigan R. Co. for obstructing the flow of water from their lands.

The complaint averred that the plaintiffs were the owners of a tract of land in Grant county; that more than thirty years before the commencement of this suit, the falling rains and FACTS. melting snow had formed a natural channel upon said tract of land through which the accumulating waters had been accustomed to flow: that the railway company, by the erection and continuance of an embankment, had caused such flow of water to be obstructed at three distinct points, from which serious damage had resulted to the plaintiffs.

A trial resulted in a verdict for the defendant, with answers to special interrogatories to the effect following: (1) that the surface of ground through which the waters resulting from rain and snow found their way out at the first point, at which it was claimed that the railway company had obstructed the flow, was about 15 acres; (2) that the surface of ground at the second point from which it was claimed the flow of water had been obstructed amounted to about 7 acres; (3) that the surface of ground drained at the third alleged point of obstruction amounted to about 11 acres; (4) that, except at points named, there was no other place for the waters accumulating on said tract of land to escape; (5) that the waters turned back upon the land of the plaintiffs was mere surface water resulting from rains and snows falling upon adjacent lands, shedding toward the railway track at the three points named.

A motion for a new trial being first refused, judgment was given upon the verdict.

Although various questions were reserved during the progress of the proceedings below, the only question made in argument here is upon the alleged error of the circuit court in its instructions to the jury.

The circuit court told the jury, amongst other things, that a watercourse is a stream of water ordinarily flowing in a certain direction, through a defined channel with bed and banks, and that there is a broad distinction between a stream of water and those occasional outbursts of water which, in time of freshets, fill up the marshy places and run over and inundate the adjoining lands; that a watercourse need not be shown to flow continuously; that its channel may sometimes be dry, but there must always be substantial indications of a stream which is ordinarily and most frequently a moving body of water; also that a channel made by mere surface water resulting from rain and snow is not a watercourse, unless there is ordinarily and most frequently a moving body of water flowing through it; that falling rain and melting snow constitute surface water which the owner of land upon which it accumulates may turn into a natural watercourse through his own land, or which he may by proper legal proceedings have carried off through the adjoining land of others; that if it should be found that there was a natural watercourse at all or any one of the places at which it was charged that obstructions had been erected, and that the the railway company caused such natural watercourse to be obstructed by the erection and continuance of its embankment, to the injury of the plaintiffs, —they were entitled to recover; but that if it should be found that there was no such watercourse at any of the places named, then the verdict should be for the defendant.

INSTRUCTIONS AS TO RIGHTS IN WATERCOURSE.

Counsel for the appellants made no specific objection to any particular part of the instructions given, of which the above is regarded as embracing the most material portions, but contend, in general terms, that the distinction sought to be made between streams of water flowing presumably out of the ground, and channels cut by mere surface water, which have been used for a long period of time to carry off such water when it accumulates, is not well sustained by the authorities; and that hence, in that respect, the instructions were erroneous,—citing authorities on the subject of easement and the right of way over the lands of adjoining proprietors.

But upon a careful review of the instructions they appear to us to be correct as abstract legal propositions, and therefore in accordance with the weight of authority upon the matters to which they relate. There was also evidence given at the trial to which the instructions as given were applicable.

We have consequently no reason for inferring that the jury were in any manner misled by the instructions given them at the trial. Taylor *v.* Fickas, 64 Ind. 167; Schlichter *v.* Phillipy, 67 Ind. 201; Templeton *v.* Washloe, 72 Ind. 134; Cairo & V. R. Co. *v.* Stevens, 73 Ind. 278; Benthall *v.* Seifert, 77 Ind. 302; Cham-

bers *v.* Kyle, 87 Ind. 83; Rice *v.* Evansville, 6 West. Rep. 242, 108 Ind. 7.

The judgment is affirmed, with costs.

Obstruction of Natural Watercourse.—See Hoeple *v.* Muscatine, 11 Am. & Eng. R. R. Cas. 550; Reuch *v.* Chicago, etc., R. Co., 11 Ib. 559; Union Pac. R. Co. *v.* Dyche, 14 Ib. 272.

Newaygo Manufacturing Co.

v.

Chicago and West Michigan R. Co.

(*Advance Case, Michigan. January* 6, 1887.)

A bill by a manufacturing company, which states that complainant owns the water-power and canal included in its premises, and that the present flow of water is no more that sufficient to carry its various mills and machinery now dependent on it for propelling power; that defendant without authority threatens, and has already commenced, to place two stone piers, to support an iron bridge to be used by it for railroad purposes, extending out into the canal on either side diagonally across it; and has taken forcible and violent possession of the property and deprived complainant of his water-power and mills, and threatens to continue such possession, to the irreparable damage of the complainant,—states facts which entitle complainant to that preventive remedy which a court of equity alone can grant.

All grants of the right of way over premises must be construed reasonably, and in the light of surrounding circumstances. Where the undisturbed and exclusive use of certain ground was necessary and essential to the best interests of the owners, as was such use of the canal itself, the proper construction of the grant of a right of way is that in whatever manner defendant makes use of its right, it must in no way interfere with complainant's free, unobstructed, and exclusive use of both the canal and the adjacent premises, except for the purposes mentioned in the grant.

Where defendant had no legal right, without the consent of complainant, to place piers for a new bridge, where the attempt was made to locate them, it was of no consequence whether complainant suffered damage or not by the proposed erections on the canal and middle ground, so far as complainant's rights are concerned. It was his right to have the use of the canal and its embankments free and unobstructed by defendant's new bridge, and the act of the latter in its attempt to infringe that right was a wilful trespass which should be restrained.

Appeal from a decree of the Newaygo circuit court rendered for the plaintiff in an action to restrain a railroad from constructing piers in complainant's canal, thereby diminishing complainant's

water-power and committing a continuing trespass on complainant's rights. Affirmed.

The facts are stated in the opinion.

Smith, Nims, Hoyt & Erwin for defendant, appellant.

W. D. Fuller for complainant, appellee.

SHERWOOD, J.—On the 1st day of April, 1873, the Newaygo Co., then a copartnership, owned lots A and B in the village of Newaygo, and the canal and water-power thereon, formed by damming the Muskegon River at that point. The Newaygo Co. and its assigns at that time and ever since have been using the water-power for the manufacture of lumber and for other purposes, the water-power being one of the largest in the State, and the company owning it has done a constantly increasing business. FACTS.

At the time mentioned, the Grand Rapids, Newaygo & Lake Shore R. was in operation to the village of Newaygo, and the railroad company desiring to extend its road to the village of White Cloud, and the route selected passing over lots A and B belonging to the complainant, they, for a nominal sum, sold and conveyed to the railroad company a right of way across their lots A and B for the use of its railroad. The deed is dated the 1st day of April, 1873. That portion of the deed needing special consideration in the case is the description and reservation reading as follows:

"A right of way in and over a certain strip of land situate, lying, and being in the village and county of Newaygo and State of Michigan, and designated as a strip of land out of block A in said village, 60 feet wide, and lying 30 feet in width upon each side of and at right angles with the centre line of said company's railroad, as staked out by John Manly, engineer, over said block, and commencing at a point on the southern boundary of said block A, 35 feet east of the range line between townships 12 north, range 12 west, and 12 north, range 13 west, in said county, and running thence northerly on a curve of 717 feet radius to the bank of the Muskegon River. That portion of said land lying between the river and millrace over which said track passes is reserved for the free and uninterrupted use of the Newaygo Co., their heirs and assigns forever. The meaning is that the road shall have the privilege to build a bridge or approach to a bridge over that portion of said land above reserved, at such an elevation as not to interfere with the usual business of the Newaygo Co.; said railroad company to have the right at any time to use the grounds here reserved for the purpose of constructing said bridge or approach thereto, or at any time to repair and maintain such bridge, approach, and railroad. For the said party of the second part and their assigns and their

servants and agents to build, construct, and maintain a railroad in and over said strip of land and at all times freely to pass and repass by themselves. their servants, agents, and employees, with their engines, cars, horses, cattle, carts, wagons, and other vehicles, and to transport freight and passengers, and to do all other things properly connected with or incident to the location, building, maintenance, and running the said road, and to use the earth and other materials within said strip of land for that purpose."

On taking possession of the right of way thus granted, the railroad company constructed its road over said lots and built a bridge over the canal for its track, keeping within the limitation of the deed, and the complainant's bill of complaint alleges that the Grand Rapids, Newaygo & Lake Shore R. Co. so used said right of way and said bridge, so constructed, until it transferred its road and other property to, and became consolidated with, the Chicago & West Michigan R. Co., the defendant in this suit.

The bill further avers that said defendant proposes to erect a new bridge over said canal in place of the first one, constructed of iron; that defendant proposes to erect for the support of the same two large stone piers placed in the canal in such manner as to greatly impede the flow of water to complainant's mill, thereby greatly injuring the complainant; that it would decrease the capacity of the canal about one third by leaving less than two thirds of the free space therein used for the passage of water and logs to the complainant's mills.

The bill of complaint further avers that finally, and on the morning of Sunday, the 24th day of January, 1886, said railway company sent a force of from seventy-five to one hundred men to Newaygo and took forcible possession of the property of your orator, and imprisoned its night watchman by it employed, and thus prevented an alarm being given: that they took possession of the saw-mill, planing-mill, and other factories belonging to your orator, and, blocking the large wheel of the planing-mill, opened the gates of the same, took out the slash-boards from the waste-weir in the saw-mill and endeavored to raise the gates in said mill; also went up to the head gates of the canal, and, using lumber belonging to your orator, and large quantities of hay brought by themselves for that purpose, shut the water out of said canal, greatly endangering the same, and freezing up some of the wheels in said mill and also the pump used for fire protection, thus endangering the entire property of your orator to destruction by fire; that during this time others, acting under like orders, commenced shovelling earth out of coffer dams into the canal to prepare a foundation for said piers; that your orator, acting through its proper agents, has forbidden the prosecution of said work and notified said men that it would defend its legal rights in the premises, and finally suc-

ceeded in securing a cessation of said work after one pile had been driven. At this time the railway company had sent a force of men with a pile-driver to drive piles for a foundation for said proposed piers in said canal.

Complainant further says: "Your orator is informed through its president and other officers that said railway company has only suspended work to arrange for a more powerful effort to renew and complete the same, and that it threatens to send a large force of men to Newaygo and drive said piles in said canal, and erect said piers therein in spite of all opposition; that if said railway conpany is allowed to drive said piles in said canal and erect said piers therein, your orator will sustain irreparable damage and loss by being deprived of the free and unobstructed use of said canal for the flowage of water and floatage of saw-logs therein to its said mills and factories: and that the damage thus sustained will be incapable of full ascertainment in a suit at law, and that the wrong done will amount to a continuing trespass upon the rights of your orator; and that the said Chicago & West Michigan R. Co. has no legal or equitable right to commit such acts and thus injure and obstruct the business of your orator."

The bill prays that "the Chicago & West Michigan R. Co., its officers, agents, and employees, may be restrained by an injunction issuing out of this court, and to it and them directed, from driving piles in the said canal so owned by your orator as aforesaid, and from constructing piers for the approach to its said river bridge in said canal or upon said piles, and from in any manner attempting so to do; and from in any manner obstructing the free and uninterrupted flow of water in said canal at the point where its said right of way and bridge now cross the same, and from injuring the banks of said canal, on said right of way, by excavations therein,—all until the further order of this court, and that said preliminary injunction may be made perpetual on the final hearing of this case, and that your orator may have such other or such further relief in the premises as the nature of its case may require, and as shall be agreeable to equity and good conscience."

The defendant filed its answer, in which most of the material facts are admitted, and justification thereof is claimed under the deed from the Newaygo Co. It claims it had the right to construct the bridge in the manner proposed and attempted.

The answer also claims and denies "that the right reserved by said deed of right of way to the said Newaygo Co., which right was a mere right of passage over said strip of ground, has passed to the said complainant, for the reason that by its terms it is expressly limited to the usual and ordinary business of the Newaygo Co. as it existed at the time said right of way was granted, and for the reason that such reserved right wholly ceased and terminated when

the said Newaygo Co. ceased to do business as such; and the said defendant denies that the structures which it proposes and has planned to build across said canal and said strip of ground will constitute any infringement of the rights reserved under such deeds of right of way, even if they are now in full force and have passed to said complainant, or any infringement of the use of said canal, or the banks, under said deed," and denies that the stone piers project into the canal, one exceeding 3½ feet and the other not more than 3 feet, and avers that the water-way in the canal, if said piers were completed, would not be obstructed by more than the projection of one of them.

The defendant admits that it sent a force of men to drive piles for a foundation for the piers in the edge of the canal, and would have continued the construction had it not been enjoined, believing it had the right so to do; and the defendant, further answering, denies that said complainant will sustain irreparable or any damage or loss by reason of the construction of said piers in said canal, either in diminution of water or in the use of the same for floatage of logs to its said mill, and avers that no damage whatever of any kind or nature will be sustained by said complainant by reason of the construction of the piers proposed to be built by said defendant, and denies that any wrong will be done by this defendant amounting to a trespass upon the rights of the said complainant, and avers that a necessity does exist for the construction of said piers in said canal.

The defendant also claims and insists that the complainant has not made out such a case as entitles it to any equitable relief, and prays the benefit of a demurrer.

The cause was heard on pleadings and proofs, before Judge Fuller, who made a decree in accordance with the prayer of the bill.

We think the bill states grounds for equitable relief, and is not subject to the demurrer claimed. The grounds stated are also sufficiently specific. It is stated that the complainant owns the water-power and canal, and that the present flow of water is no more than sufficient to carry the various mills and machinery now dependent upon it for propelling power; that the defendant without right or authority threatens, and has already commenced, to place two stone piers, large enough to support an iron bridge to be used for railroad purposes, extending out into the canal on either side and diagonally across the same, 10 feet, and, for the purpose of erecting said piers and building said bridge, have taken forcible and violent possession of the complainant's property, deprived it of the use of its water-power and mills, and threatens to continue such possession until the bridge is completed; that the complainant will thereby be deprived of the use of about one third

BILL IS NOT DEMURRABLE.

of the water-power and way, and the stability of the embankment of the entire canal will be endangered.

It would seem that such a state of facts ought to entitle the complainant to the equitable consideration of the court, and to that preventive remedy which a court of equity alone can grant.

Substantially such is the case made by the bill; and, if these facts are true, a more flagrant violation of private rights, committed in open defiance of law, and against the public peace, has seldom been brought to our attention in an equity pleading.

We now come to the merits of the case as presented by the record.

The first important question to be considered is, What is the true construction of the deeds under which the defendant claims the right of way over the premises of the complainant? If we examine these deeds under the rule recognized and approved by this court in McConnell *v.* Rathbun, 46 Mich. 303, that "all grants must be construed reasonably and in the light of surrounding circumstances," we shall, I apprehend, have but little difficulty. The surroundings of the parties and their expectations in regard to the future development and increase of business, and the probable necessity for an increase of power which could only be obtained by the widening of the canal, and everything relating to the full enjoyment of the water-power to its largest extent, must have been contemplated and in the minds of the parties interested at the time the right of way was conveyed to the Grand Rapids, Newaygo & Lake Shore R. Co. in 1873. The Newaygo Co. then owned in fee all the property necessary to enable it to develop the power to its fullest extent. It owned the entire power and exclusive right of boomage and flowage along the banks of the Muskegon River for six miles up the stream, and the property was "bought for the purpose (as stated by one of complainant's witnesses) of the manufacturing business, with the intention of increasing it as fast and as much as the power of the river would warrant."

CONSTRUCTION OF DEEDS.

Newaygo county, at the time the right of way for the railroad was obtained, contained a large amount of valuable timber of nearly every variety and of the choicest kinds, which, with the advantage of the almost unequalled water-power of the Muskegon to aid in its manufacture, made the property and water rights of the Newaygo Co. now in question of the utmost importance and greatest value, not only to the owners, but to the railroad company itself, inasmuch as the early business of the road was very largely supplied from the lumber and other articles manufactured at the mills of the complainant.

These are some of the circumstances surrounding the parties at the time the conveyances of the right of way claimed by the defendant were made.

And we do not think it was in the mind of either of them, or the agents who transacted the business for them, nor the intention of any of them, that the water rights of the complainant or anything appurtenant thereto, which the complainant, or rather the Newaygo Co., believed to be necessary to the complete enjoyment of the fullest development possible of the said water-power, was to be surrendered to the use of the railroad company.

The question then arises: Did the Newaygo Co. make any such surrender in the conveyances made? Let us see for the moment what is the situation of the premises in question. The Muskegon River is a large, rapid stream, passing through Newaygo village nearly east and west. It runs nearly in a straight line the length of the canal, starting at the dam across the river. The canal runs from the dam parallel with the river below, about 500 feet. The distance between the canal and the water in the river at the bottom of the embankment is about 70 feet. The embankment is about 20 feet wide on the top, and the north side of the embankment extends to the water in the river. The top of the embankment is and always has been used as a road. It is about 10 feet wide and then begins to slope down on either side. This road or track is used by the company in repairing the embankment and the guard-gates and other works at the dam, and there is no other practicable way of reaching these gates and works. At this point the river runs west, and the right of way is located about one third of the length of the canal west of the dam.

The land between the canal and river is a made bank—needs to be looked after frequently—supporting an immense pressure from the water. Its construction and usefulness can only be maintained by the most thorough and substantial work. The canal is used not only for conducting the waters from the river to the company's machinery, but also for the purpose of floating logs and timber from the river to complainant's mills. From 10,000,000 to 12,000,000 feet now pass over this water-way annually in conducting complainant's business. It also appears from the testimony that the most feasible and practicable way of widening the canal is by extending it towards the river. These are some of the surroundings of the property in question, which must be taken in consideration in construing these conveyances by which it is claimed. This embankment, or middle-ground, if it may be so called, was given up to the use and control of the railroad company, to such extent as its interests should from time to time require, by the old Newaygo Co.

When these surroundings are properly considered it is impossible, it seems to us, to come to the conclusion that any such rights were intended to be included in the right of way conveyed. It is clear that the free, undisturbed, and exclusive use of the middle-

ground was as necessary and essential to the best interests of the Newaygo Co. as was such use of the canal itself, and that the proper construction of the conveyances has been given by counsel for complainant, that in whatever manner the defendant makes use of its right of way, it must in no way interfere with the complainant's free, unobstructed, and exclusive use of both the canal and the land lying between it and the river, except for the two purposes mentioned, viz.: (1) for the purpose of constructing a bridge and approach thereto of sufficient height over the canal and middle-ground, so as not to interfere with the complainant's business; and (2) for the purpose of repairing such bridge, approach, and railroad; and when so used by the defendant, it must be without injury to the property, rights, and business of the complainant.

We think the manner of constructing the first bridge, and the placing the piers therefor,—the one on the north side in the river, and the other on the south side, beyond the south bank of the canal,—and the fact that two members of the old Newaygo Co., viz., Mr. Wood and Mr. Lawrence, refused to make the conveyance of the right of way until the location of these two piers was made and established, as intended by the parties in the conveyance,—and in which locations they have ever since remained until attempted to be changed by the present owner,—very clearly indicate that the construction claimed by defendant's counsel is not in accordance with the original purpose of the parties to the deed, nor with the construction they gave it.

LOCATION OF BRIDGE.

We think the defendant had no legal ground whatever, without the consent of the complainant, to place the piers for the new bridge where the attempt was made to locate them. It was of no consequence whether the complainant suffered damage or not by the proposed erections in the canal and middle-ground, so far as the complainant's rights are concerned.

USE OF CANAL AND EMBANKMENT.

It was the right and privilege of complainant to have the use of the canal and its embankments free and unobstructed by the defendant's bridge, and the acts of the latter in its attempt to infringe that right was nothing less than a wilful trespass on the part of those participating, and they were properly restrained from proceeding further, by the court. It is unnecessary for complainant to invoke the aid of How. Stat. § 3323, to secure its rights in this case. The complainant's title to the premises is sufficient for that purpose. We do not think upon this record that the defendant had any consent, legal or otherwise, from the complainant to do what was attempted by its agents and employees.

The rights reserved to the Newaygo Co. from the right of way conveyed by the deeds were not limited to that company's use.

That company was no more than a partnership composed of three individuals, but it was clearly intended, we think, and it is so stated in the conveyances, that they extended to their heirs and assigns; and complainant is now well entitled to use and enjoy the same to the same extent that the old Newaygo Co. could had it not conveyed the property.

We think it fully appears from the record in this case that the injury, threatened, attempted, and restrained is of such a nature as to materially lessen the enjoyment of the property and rights of the complainant, and in such cases there can be no question but that the grievance becomes one of equitable cognizance, and the duty of courts is plain. Walker, Ch. 113.

The encroachment complained of by complainant, if allowed to continue, would eventually ripen into a title, and can only in this way be prevented without the necessity of bringing a multiplicity of suits (High. Inj. § 724); and as to damage being irreparable in such cases, see Washburn on Easements, p. 243.

It is unnecessary to continue the discussion of the case further. Suffice it to say, it is one of those cases where no technical rules of either pleading or construction can be properly applied.

Technicalities in equity may be resorted to when in no other way can the just rights of the parties be protected and preserved; but they are intolerable in any other case, and should not be allowed to control.

After a careful examination of the questions involved, we are of the opinion that the decree of the circuit judge is correct and should be affirmed.

CHAMPLIN and MORSE, JJ., concurred.

CAMPBELL, Ch. J. (dissenting): I do not agree in the conclusions reached by the circuit court in this case. When the defendant received a deed of the right of way over the land now owned by complainant, it gave a right to erect such bridges and other improvements as would belong to any railway had the land been condemned, except so far as modified by the terms of the grant. The only reserve was in favor of a water-way then existing and supplying works also existing. I do not think this exception or burden can be enlarged at the pleasure of complainant. So far as its enlargement has been acquiesced in, defendant cannot now destroy it, and had such been the effect of this action I should concur in holding it illegal. But the piers which the defendant company propose to erect leave a passage considerably wider than is furnished by other parts of the canal, and practically much more spacious than the entrance through which all logs are run in. I do not think there is any proof which authorizes the inference that the bridge as contemplated will be any

hindrance whatever to any business now provided for by the canal. The possibility that it may some day or other be found desirable to enlarge it is not one of those things provided for in the grant, and cannot, I think, be imported into it. There is no such restriction on the right of defendant which I think is absolute, except as already suggested. Had the grant been so limited as to leave it open to an inference that the complainant's business might be enlarged in the ordinary course of improvement, there would still be as great an equity in favor of the enlarged and improved conditions of the railway as of the mills. Any argument which would cut off a great public way from adaptation to its growing needs would be quite as unreasonable as the limitation of other enterprises in which public convenience is not subserved so directly. But I do not think the grant is open to any such construction.

Whatever may be thought of the methods resorted to in beginning the piers, they cannot destroy the legal right of defendant to build the bridge in a more quiet way, or justify a permanent injunction. I think complainant made out no case for the relief granted.

Injury to Mill by Obstructing the Natural Flow of Stream.—In McElroy v. Glob., 6 Ohio St. 187, it was *held*, that the use of streams of water for domestic, agricultural, or manufacturing purposes being to some extent a public right, an action for a nuisance caused by any obstruction or diversion of a stream for any such purpose will not lie unless the damage occasioned thereby is real, material, and substantial. For other authorities, that an insensible or minute diminution or interference with a stream by a riparian owner in the course of a proper use of the stream not causing damage, is no infringement of other riparian proprietor's rights, and is not actionable, see Wadsworth v. Tillotson, 15 Conn. 366; Martin v. Bigelow, 2 Aik. (Vt.) 184; Ford v. Whitlock, 27 Vt. 265; Canfield v. Andrews, 54 Vt. 1. Plaintiff was the owner of a mill operated by water-power furnished by a creek. Defendant, who was a riparian owner above, under a claim of right, diverted the waters of the creek. *Held*, that plaintiff was entitled to maintain an action to recover the damages sustained, and restrain such diversion. Garwood v. N. Y. Cent. & Hud. Riv. R. Co., 83 N. Y. 400.

DRAKE

v.

CHICAGO, R. I. AND P. R. CO.

(*Advance Case, Iowa. October* 27, 1886.)

Where a petition states as a cause of action that a defendant had failed to construct and keep in repair sufficient and suitable drains, it is not error for the court to instruct the jury, in the trial of the action, on the theory that a ditch had been constructed.

Before the declarations of an alleged agent can be admitted in evidence against his principal, some evidence that he was authorized to act for his principal in relation to the matter in hand must be introduced.

A landlord has no such interest in the growing crops of his tenants as to enable him to maintain an action against a person who injures the crops.

Where the court, in its charge, has fully stated the issues in an action to the jury, a remark that "they are referred to the pleadings for the issues" is not prejudicial.

A jury should not, in the trial of an action, reject the evidence of any witness simply because it is in conflict with the evidence of other witnesses; but they should determine, in the light of the story told, and all the circumstances, the very truth of the proposition, whatever it may be.

APPEAL from Van Buren district court.

This cause was before the court at a former term, and will be found reported in 63 Iowa, 302, and 19 N. W. Rep. 215, to which reference is made as to the grounds upon which a recovery is asked. Trial by jury. Judgment for the plaintiff, and the defendant appeals.

M. A. Low and *Stiles & Beaman* for appellant.

H. B. Hendershott and *Sloan, Work & Brown* for appellee.

SEEVERS, J.—1. We understand the cause of action stated in the petition to be one where a recovery is sought upon the ground that the defendant failed, as was its duty, to construct and keep in repair sufficient and suitable drains, ditches, and culverts, and thereby, and because of the roadway or embankment, surface water accumulated, and was thrown back on plaintiff's premises, whereby he was greatly damaged. The petition, we understand, states two distinct grounds of recovery: The first, that FACTS. no sufficient ditches and drains were constructed; and, second, that the ditches were not kept in repair. Now, while it is not in terms stated that any ditches were constructed, we think, when the petition is fairly construed, it means that ditches were constructed, and not kept in repair. Certainly a ditch could not be repaired, or kept in repair, which had never been constructed. If the petition was not deemed sufficiently definite and certain in this respect, a motion to make it more specific should have been made. It should be remembered that this case had been previously tried on this same petition, and the evidence on both trials was substantially the same, and therefore the defendant could not have been in any respect surprised when the court submitted the case to the jury on the theory that a ditch had been constructed which had not been kept in proper repair. The court therefore did not err in this respect.

2. It is insisted that the defendant had the right to construct the embankment as it did, and that it was not bound to construct ditches to carry off the water, and that if it did so it was not

bound to keep them in repair. This question was considered on the former appeal, and we then held that the position of the defendant could not be maintained. The record in this and the former appeal is, as we understand, substantially the same, in so far as the question whether it was the duty of the defendant to construct ditches and keep them in repair is concerned. This being the second appeal, our former decision constitutes the law of this case, whether right or wrong. Adams Co. *v.* Burlington & M. R. R. Co., 55 Iowa, 94; s. c., 2 N. W. Rep. 1054; Babcock *v.* Chicago & N. W. R. Co., 28 N. W. Rep. 644.

CONSTRUCTION OF DAMS, DRAINS, ETC.

The writer, however, desires to say he is now satisfied that the opinion on the former appeal is wrong. My reasons, briefly, are that the common-law rule, as between individuals who respectively own the upper and lower estate, is that either may, for the purpose of improving his land, direct or dam up surface water; and if, in so doing, the other suffers damage, there can be no recovery. The only exception to this rule is that the improvement, whatever it may be, must not have the effect to increase the quantity of water which is precipitated on the land of another. I cite a few of the many authorities so holding: Livingston *v.* McDonald, 21 Iowa, 160; Gannon *v.* Hargadon, 10 Allen, 106; Parks *v.* Newburyport, 10 Gray, 28; Taylor *v.* Fickas, 64 Ind. 167; Barkley *v.* Wilcox, 86 N. Y. 140; Swett *v.* Cutts, 50 N. H. 439; Bowlsby *v.* Speer, 31 N. J. Law, 651; Gibbs *v.* Williams, 25 Kan. 214; Grant *v.* Allen, 41 Conn. 156. The rule of the civil law is different, and it has been adopted in Illinois and California, and possibly in other States. The same common-law rule has been held applicable to railroads in the following cases: Boothby *v.* Androscoggin & K. R. Co., 51 Me. 318; Morrison *v.* Bucksport & B. R. Co., 67 Me. 353; O'Connor *v.* Fond du Lac, A. & P. R. Co., 52 Wis. 526; s. c., 9 N. W. Rep. 287; Kansas City & C. R. Co. *v.* Riley, 6 Pac. Rep. 581; Cairo & V. R. Co. *v.* Stevens, 73 Ind. 278; Abbott *v.* Kansas City, St. J. & C. B. R. Co., 83 Mo. 271. In at least one or more of these cases the fact that the company only owned an easement was considered, and it was held that such fact made no difference, and I am at a loss to know why it should. The same rule, under the same circumstances, should prevail as to both individuals and corporations. Conceding the easement in this case, the defendant has the same absolute right to construct its road therein at such grade as is deemed best, and to excavate and make embankments at its pleasure; and in this respect it has the same rights, in my judgment, as any other landed proprietor.

3. The plaintiff testified that one Ball was defendant's agent, engaged in "settling for stock along the road and everything," and that he acted for the defendant in a lawsuit it had with one

Johnson; and thereupon the plaintiff, when on the stand in his own behalf, was asked by his counsel to state a conversation he had with Ball in relation to the drain or ditch. To this the defendant objected, and the court asked plaintiff's counsel whether they expected to show that Ball was the authorized agent of the defendant. Counsel replied they did; and the court said unless they introduced such evidence that the evidence showing the declarations of Ball would be excluded, but that for the present the examination might proceed. Thereupon evidence of the declarations of Ball was admitted. When the plaintiff had rested, the defendant moved to exclude such evidence because there was no evidence tending to show that Ball had any authority to act for the defendant in relation to the ditch or drain, or bind the defendant by anything he said or did. The motion was overruled. It should have been sustained. The fact that Ball acted for the defendant in the lawsuit with Johnson, and that he settled for stock killed or injured, does not make him a general agent. He may have been an agent vested with full power and authority to bind the defendant in relation to special matters, but the evidence fails to show that he had any authority to act for the defendant as to the road-bed, ditches, or drainage. Before the declarations of an alleged agent can be admitted in evidence against his principal, some evidence that he was authorized to act for his principal in relation to the matter in hand must be introduced. EVIDENCE OF AGENT.

4. The point that the action is barred by the Statute of Limitations is insisted on. This question must be regarded as definitely settled by the opinion in the former appeal. STATUTE OF LIMITATIONS.

The rule as to the measure of damages was also then settled, and we are unable to see that there was evidence admitted for the purpose of establishing the amount the plaintiff was entitled to recover which was materially prejudicial under the rule of the former opinion. As we understand, a portion of the crops injured belonged to one Fite, a tenant of the plaintiff. Such crops had not matured, and the jury found specially that the plaintiff had been allowed $32 as damages "to his interest in the corn put in by Fite," and the judgment included such amount. At the proper time the defendant moved to exclude all evidence in relation to the injury to Fite's crops. The motion was overruled. We think it should have been sustained. A landlord has no such interest in the growing crops of his tenant as to enable him to maintain an action against a person who injures the crop. Townsend *v.* Isenberger, 45 Iowa, 470.

5. The charge of the court is criticised, but we have been unable to discover any well-grounded objections thereto, unless, possibly, it can be said that the jury are referred to the pleadings for

the issues. The court so fully stated the issues in the charge that the brief reference to the pleadings can hardly be said to be prejudicial. Be this as it may, the attention of the court having been called thereto, the objectional reference will no doubt be omitted on another trial.

There is also an objection to paragraph 30 of the charge, which we think should be more specifically referred to. The paragraph is as follows: "You are the sole judges of the credibility of the witnesses, and the weight to be given to their evidence. If the evidence is conflicting, you should harmonize it, if you can consistently with the honesty of the witnesses. *But if you cannot so harmonize it, you are at liberty to say who you regard as truthful and honest.*" The portion italicised is objected to, and in relation thereto it is said that under it the jury may arbitrarily reject the evidence of any witness. It is due to the court to say that some directions in connection with the foregoing were given the jury which possibly remove the objections made to the instruction; but we think it was not as well guarded as the instruction which, to some extent, was condemned in State *v.* Fowler, 52 Iowa, 103; s. c., 2 N. W. Rep. 983. The jury should not reject the evidence of any witness simply because it is in conflict with the evidence of other witnesses; but they should determine, in the light of the story told, and all the circumstances, the very truth of the disputed proposition, whatever it may be.

For the reasons above stated the judgment of the district court is reversed.

Railroad—Imperfect Culvert.—If there is no difficulty in constructing a culvert under a railroad, to carry of the water from a meadow over which the railroad passes, the railroad company will be liable for flowing the meadow if they do not make a culvert, with ditches to and from it, sufficiently low to drain off the water. See Wayland *v.* St. Louis, etc. R. Co., 11 Am. & Eng. R. R. Cas. 543; Rathke *v.* Gardener, 14 Ib. 281; Louisville, etc., R. Co. *v.* Hays, 14 Ib. 284.

SALISBURY

v.

WESTERN NORTH CAROLINA R. CO.

(91 *North Carolina*, 490.)

A railroad company, in the repair of its road-bed at a point several miles above the plaintiff's mill, caused large quantities of mud to be washed down into a creek, by the process of sluicing, thereby lessening the volume of

water used in operating the plaintiff's mill and causing the damage complained of; whether the company is liable in such case for consequential damages growing out of the exercise of a right conferred in its charter—*Quære.* But if the power was exercised recklessly and without a due regard to the interests of others, the company would be liable for the resultant injury.

The possession and working of the mill by the plaintiff without interference, after as before his conveyance of the land (upon which was the mill-site) to a trustee for the benefit of his wife, afford *prima facie* evidence of such a personal interest in its operations as entitles him to maintain his action for the damages he has himself sustained, notwithstanding the trustee may sue for such damages as may affect the land as an inheritance.

This action is not for compensation for land appropriated by the company, but seeks remuneration for a special injury occasioned by an alleged wrongful act.

CIVIL action for damages tried at Fall Term, 1884, of Burke superior court, before Gilmer, J.

In deference to an intimation of the court that the action could not be maintained, the plaintiff suffered a nonsuit and appealed.

P. J. Sinclair and *Batchelor & Devereux* for plaintiff.

D. Schenck and *Reade, Busbee & Busbee* for defendant.

SMITH, C.J.—The plaintiff was in possession of a mill for grinding wheat and corn, and had been since 1877, when it was rebuilt, operating the same, on Mill creek, the waters of which, raised by means of a dam, were used as a motive force in propelling the machinery. FACTS.

In 1879 he executed a deed conveying the tract of land whereof the mill-site and the area covered by the pond formed part, to one John T. Reid in trust for his wife Julia C., during her life and in remainder for their son, with certain contingent limitations, not needful to be specified in the present opinion.

In the year 1882, the defendant company in the repair of their road-bed, some several miles above, at a place known as "Mud Cut," by the use of rubber tubes in the process of sluicing, caused large quantities of loose mud to be washed down, which passing into the creek were deposited in the pond, lessening the volume of water therein, diminishing its power, and obstructing the operations of the mill and reducing its capacity to grind to a degree affecting its profits.

The engineer in the service of the defendant estimated that five acres, making a half million of cubic yards, had been thus sluiced or carried away by the current of moving water.

To recover compensation for the damage sustained in running the mill, by reason of the large accumulation of mud in the pond, the present action is brought.

Much evidence was offered to show the necessity of removing the mud and by the process of sluicing, as the only available

means of making the transit over that part of the road permanent and safe.

The argument before us entered largely into the question of the defendant's right under the charter to do the work and maintain the road in proper repair, without accountability at the common law for consequential damages growing out of the exercise of the right conferred in the charter. The subject is not free from difficulty, but it is not presented in the appeal, and we do not propose to depart from the settled practice which confines our examination to such matters of exception as appear in the record.

After the conclusion of the testimony and the opposing counsel had been heard, the court intimated that the plaintiff had no such estate or interest in the land as enabled him to maintain the action, and thereupon his counsel submitted to a judgment of nonsuit and appealed.

PLAINTIFF'S INTEREST CONSIDERED.

The only inquiry then before us is as to the sufficiency of the plaintiff's interest or property upon the evidence to sustain his claim for damages resulting from the interruptions in the operations of the mill which he was running.

The very statement of the ruling in this form seems to convey convincing proof that it is erroneous. The possession and working of the mill, continued over a period of several years by the plaintiff without interference from any one, in the same manner after as before his conveyance of the land, afford *prima facie* evidence of a personal and direct interest in its operations, the impediment to which produces a remedial injury. It is but a reasonable inference from the plaintiff's possession and use of the mill, that it was with the assent of the trustee, and (in the absence of evidence of any conditions or terms) on his own account and for his individual benefit. If he was a mere servant or managing agent for the owner of the property, some proof of this relation should have been produced, for it cannot be inferred from the mere fact that the title was in another. Every person conducting a business is presumed to do so on his own responsibility and for his own advantage.

The ruling of the judge assumes that the testimony shall be taken in its aspects most favorable to the plaintiff, and if the jury would be warranted in finding that the plaintiff was operating the mill for himself and receiving the profits, and these have been cut short in consequence of the act of the defendant, we can see no reason why he may not, if any one else can, seek, through an action, compensation for the damages he has himself sustained in conducting his business.

The plaintiff, however, has not possession alone of the mill, but, the jury may find upon the evidence, a direct and important interest in its successful operations; and certainly this was sufficient to

enable him, so far as this matter is concerned, to maintain his action.

But the court may have so adjudged on the ground that compensation is due only to the owner of the property, so that the result would transfer to the company the easement or right to make this disposition of the removed earth. This is a misconception of the nature and purpose of this action. It does not rest upon the idea of a right acquired by the defendant by payment of compensation to one who thus transfers it, but the damages claimed are the measure of an injury done—remuneration for a special wrongful act and extending no further.

It is not material that the trustee may also sue, for each may obtain redress for the injury to himself, the recovery by the plaintiff for his damages interposing no obstacle to the recovery of such as may affect the land as an inheritance. These demands are several and distinct, and so may be the actions to enforce them.

Again, the complaint charges that the act of the defendant was unlawful and wilful, that is, that the method adopted for the removal of the mud was unnecessary and injurious, and evidence upon this allegation was before the jury. We do not understand the counsel for the defendant to deny, that, if the power conferred in the charter was exercised negligently and without a due regard to the interest of others, and an injury was suffered in consequence, the company would be exposed to an action for redress in some form, it being an underlying condition of the grant, to use the words of Pearson, J., in Meares *v.* Commissioners of Wilmington, 9 Ired. 73, that "the work is done in a proper manner." Still more strongly would be the incurred liability for a wilful and reckless act committed in the alleged exercise of the power.

METHOD OF MAKING IMPROVEMENTS.

The effect of the action of the court is to withdraw from the consideration of the jury the evidence of the facts upon which the alleged wilful conduct or negligence in the attempted use of the delegated authority is dependent.

But the pursuit of this inquiry would lead us into a discussion not germane to the appeal, and we will only repeat that upon the evidence it does not affirmatively appear, that the plaintiff has no such interest in the mill and its working as entitles him to seek redress by action.

The nonsuit must set aside and a *venire de novo* awarded, to which end let this be certified.

Error. *Venire de novo.*

Consequential Damages of Embankment.—Reusch *v.* Chicago, etc., R. Co. 11 Am. & Eng. R R. Cas. 559.

Railroad, Diverting Water used in Operating Mill.—In Waffle *v.* N. Y. Central R. Co., 58 Barb. (N. Y.) 421, the question as to the right of parties

to deal with surface water arising upon their premises, when its diversion affected the value of mill property in part dependent upon such water for its motive power, was very ably discussed and disposed of by Johnson, J. In that case the defendants, in the construction of their railroad at a distance of about two miles from the plaintiff's mill, for the protection of their road-bed dug two ditches or trenches, one on either of their road, to protect the embankment. The plaintiff had a mill and mill-pond on a stream formed, in the main, from the surface waters arising from the low, boggy lands in the vicinity. The effect of the construction of the defendants' road and the ditches referred to was to prevent the water from going to the plaintiff's mill in its usual volume in dry seasons, and cause it to be discharged there in such volumes in times of high water, that the plaintiff could not use it for the operation of his mill, but was compelled to throw open his flood-gates and let it run to waste. The court said: "There is no dispute about the facts in this case. The plaintiff's saw-mill is upon a small stream, nearly two miles below the point where the defendants' road crosses such stream. At that point the land is naturally low and marshy, and the defendants, in constructing their road, raised the bed thereof above the natural surface of the land, by excavations on each side, which made ditches by means of which the surface water of this low marshy land was for a considerable distance drawn off and passed into the stream on each side of the road-bed where the stream is crossed by the road. These ditches are wholly upon defendants' land, and conduct the surface water into this stream upon their own land. The only cause of action stated in the complaint is in substance that, by means of these ditches, the water from this low land is drawn off and conveyed into this stream more rapidly than it would be otherwise; and in the wet season, and in times of flood and high water, filled the stream and the plaintiff's pond so full, and increased the volume of water to such an extent, that he could not use the same, but was compelled to open his gates and let the water flow without using the same; and that, as the dry season came on, the water was by the same means drawn off so rapidly from these low, wet grounds that the stream did not keep up as it did before, and the supply which said stream was accustomed to receive gradually from such wet lands was earlier exhausted, and the plaintiff's mill thereby was compelled to lie idle and unemployed for want of water for a much longer period than formerly, and a much longer period that it would had these drains not been made. The testimony tended to sustain these allegations in the complaint. It appeared from the evidence that there was no natural outlet or water-course from this low, wet land into the creek, but a gentle and gradual inclination of the surface for a long distance towards the stream. The defendants' ditches extended through these lands for a distance of over two miles, and it appears that the owners of the land along this distance, adjacent to the railway, have availed themselves of defendants' ditches and drained the surface water from their lands, by means of ditches through the same emptying into the defendants' ditches. By these means the surface water is discharged from these wet lands and the same are rendered tillable and productive, instead of remaining waste lands, and serving as a mere reservoir to hold water for the use of the plaintiff's mill for a few more days or weeks each summer.

"It is entirely clear that these facts constitute no cause of action. Every person has the unquestionable right to drain the surface water from his own land to render it more wholesome, useful, or productive, or even to gratify his taste or will; and if another is inconvenienced or incidentally injured thereby, he cannot complain. No one can divert a natural water-course through his land to the injury of another with impunity, nor can he, by means of drains or ditches, throw the surface water from his own land upon the land of

another; or where it can be done by drains emptying into a natural stream and water-course, there can be no doubt of his right thus to drain, even though the effect may be to increase the volume of water unusually at one season of the year or to diminish the supply at another."

JONES

v.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN R. Co., Appellant.

(84 *Missouri* 151.)

In the absence of negligence, unskilfulness, or mismanagement in the construction of an embankment for its roadbed over land through which there is no natural channel for the passage of water, a railroad, having lawful authority to construct such roadbed, is not liable for the injury done by the embankment in causing water to overflow land of an adjoining proprietor.

APPEAL from Butler circuit court. HON. R. P. Owen, J. Reversed.

Bennett Pike for appellant.

C. D. Yancey for respondent.

NORTON, J.—This is an action for damages in which plaintiff recovered judgment, from which the defendant appeals and assigns for error the action of the court in refusing to instruct the jury that on the pleadings and evidence plaintiff was not entitled to recover. The cause of action stated in the position is, FACTS. in substance, that the railroad of defendant was constructed through plaintiff's land in Wayne county in a northerly and southerly direction, leaving a portion of his land, about fifteen acres along Black river on the west, and twenty acres of cultivated land on the east, side of the roadbed. That said roadbed was originally built across said land upon a solid embankment several feet high, making a dam against the high water from Black river; that in 1876, some years after the said construction of the roadbed at said point, the said embankment was washed out by high water from Black river, by which the water was admitted on the land of plaintiff. That defendant, in rebuilding said roadbed at the point where the same was broken, put in trestle-work for the space of one hundred and fifty feet, through which the high water from Black river overflows on plaintiff's land, and spreads over plaintiff's land on the east, and renders fifteen acres of the same valueless.

The answer of defendant, in substance, was a special denial and a special plea of a right to construct its railway through said county

of Wayne, and the construction of said railroad through said county and over the land of plaintiff therein, by virtue of the acquisition of a right of way, duly granted by the owner of said land, in a proper manner, and the rebuilding of a portion of the same in 1876, and the putting in of a trestle in the place of an embankment for the space of one hundred and fifty feet, in a proper manner, and as the result of a change being necessary, in order to protect its roadbed against destruction by the recurrence of extraordinary high water in Black river, which runs along the roadbed some distance to the west.

The testimony of the plaintiff was to the effect that, whenever Black river overflows, the water runs through the trestle to the east and overflows plaintiff's land, and runs down into a low piece of ground about three hundred yards below the trestle, where on account of the embankment of the railroad it cannot flow back to Black river, but spreads out over about fifteen acres of plaintiff's land, rendering it useless for cultivation. The testimony of defendant's civil engineer, Bartlett, showed that the railroad was built through plaintiff's land in 1872 and 1873, upon an embankment several feet high, and that in 1876, in consequence of a great rise in Black river, the embankment was washed out, and that in rebuilding it, it became necessary to put in trestle-work in place of the embankment, as no embankment, such as they could build there, could withstand the high water. That the putting in the trestle did not affect the natural flow of the high water from Black river over plaintiff's land; that the natural tendency of the overflow from Black river was over plaintiff's land, and through the sloughs on said land into Cypress Lake, a body of water east of the roadbed. It was admitted by plaintiff that defendant had obtained the right of way over plaintiff's land to construct its railway.

There is no negligence alleged by plaintiff in the construction of the trestle. The only claim made is for damages to plaintiff's land by reason of the defendant railway building and constructing a trestle in 1876, for the space of one hundred and fifty feet, in place of the embankment that was washed out, by means of which it is claimed the high water from Black river passed through said trestle and overflowed and stood upon plaintiff's land, in consequence of there being no opening made three hundred yards distant from and below the trestle. The uncontradicted evidence of defendant's civil engineer shows the necessity of the change in the reconstruction of the roadbed of defendant at the point of the washout. The whole evidence shows that there was no interferance with a running stream, no damming up of any water, running or surface water, by the construction of the trestle. The high water from Black river simply ran through the trestle onto plaintiff's land, just where and as it would have run without any rail-

road bed there; but the real ground upon which a recovery is claimed, under the vague allegations of the petition, is the failure to make an opening or passageway through the embankment of the roadbed, for draining off the surplus water from Black river, that is alleged to have accumulated on the east side of the railroad.

Under the pleadings and facts above disclosed by the evidence on the trial, we are of the opinion that the court erred in refusing to instruct, as requested by defendant, that plaintiff was not entitled to recover. In the case of Clark's Admr. *v.* H. & St. Jo. R. Co., 36 Mo. 202, it was held that, in the absence of any negligence, unskilfulness, or mismanagement in the construction of the embankment for the bed of a railroad over land, through which there was no natural channel for the passage of water, the injury done by such embankment, in causing the water to overflow the land of the adjoining proprietors, must be considered as the natural consequence of what the corporation had acquired the lawful right to do by a condemnation of the land and the assessment of damages therefor, and such damages must be taken to have been included in the compensation assessed, or it was *damnum absque injuria.* ERROR IN INSTRUCTION.

The doctrine of this case has been fully approved in the case of Abbott *v.* K. C., St. Jo. & C. B. R. Co., 83 Mo. 271, where the question involved in this record was exhaustedly considered in an opinion rendered by Judge Ray, in which the ruling made in the case of McCormick *v.* K. C., St. Jo. & C. B. R. Co., 70 Mo. 359, which is the same case reported in 57 Mo. 443, to which we have been cited by plaintiff's counsel as sustaining his right to recovery, was overruled, in so far as it came in conflict with the ruling in the case of Clark's Admr. *v.* H. & St. Jo. R. Co., *supra.* The case of Abbott, *supra*, is decisive of this case.

Judgment reversed; all concur.

Surface Water—Absence of Channel.—See Kansas City, etc., R. Co. *v.* Kiley, 20 Am. & Eng. R. R. Cas. 116; St. Louis, etc., R. Co. *v.* Harris, 26 Ib. 608.

Obstruction of Surface Water by Railroad Bed.—Drake *v.* Chicago, etc., R. Co., 17 Am. & Eng. R. R. Cas. 45; Little Rock, etc., R. Co. *v.* Chapman, 17 Ib. 51; Hanlin *v.* Chicago, etc., R. Co., 20 Ib. 70; Gulf, etc., R. Co. *v.* Helsey, 20 Ib. 89; Chicago, etc., R. Co. *v.* Benson, 20 Ib. 96; Kansas City, etc., R. Co. *v.* Riley, 20 Ib. 116; Louisville, etc., R. Co. *v.* Hays, 14 Ib. 284; Hoganon *v.* St. Paul, etc., R. Co., 14 Ib. 291; St. Louis, etc., R. Co. *v.* Harris (Ark.), 608.

Railroad Embankment—Injury by Diverting Surface Water.—In Hatch *v.* Vermont Central R. Co., 25 Vt. 67, the plaintiff sought to recover for consequential injuries arising from the construction of the defendant's railroad in the village of Burlington, upon the ground that the excavations and embankments made by the defendants in the necessary construction of their road prevented the free escape of surface water arising from rains and the melting of snow from the streets, so that it was sent into his store and upon

his premises to his damage, and thereby his premises were rendered less accessible from the street; that before the erection of the defendant's road people could safely hitch their horses in front of his premises, and that he could safely drive to and from his premises with horses and carriages. The court held that the plaintiff was not entitled to recover the damages ensuing from these acts of the company, upon the ground that, even if the acts had been done by an individual clothed with no special powers from the State, it would not have created an actionable injury. The work done was lawful. It was performed prudently and "with as little injury as possible to the plaintiff's property," etc. The learned judge said: "In the absence of all statutory provisions to that effect, no case, and certainly no principle, seems to justify the subjecting a person, either natural or artificial, in the prudent pursuit of his own lawful business, to the payment of consequential damages to other persons in their property or business. But in some of the States it is held that a railroad company has no right by an embankment to obstruct the natural flow of surface water. The owner of a servient heritage has no right, by embankments or other artificial means, to stop the natural flow of the surface water from the dominant heritage and thus throw it back upon the latter. Gillham v. Madison Co. R. Co., 49 Ill. 484; Toledo, etc., R.Co. v. Morrison, 71 Ill. 616; Raleigh, etc., Air Line R. Co. v. Wicker, 74 N. C. 220; Wabash, etc., Canal Co. v. Spears, 16 Ind. 441. A railway company must so maintain its embankments as to permit the passage of the surface water produced by the climate of the country. Conish v. Chicago, Burlington, etc, R. Co., 49 Iowa, 378. Where one sustained damages to his property resulting from freezing upon his premises of water which poured thereon from the tank of the railroad company, the damage sustained in consequence of the freezing and detention thereby of the water, but for which the water would have flowed down and off the premises without injury, it was held that the company was liable, as the injury was one which might reasonably and naturally have been expected to result; and that the plaintiff could recover for damages resulting from the melting of the ice in the spring, although this occurred some time after the suit was brought. In a suit for damages caused by water from the tank of a railroad company overflowing the plaintiff's premises, it appeared that some of the water which caused the injury did not come from the tank, but that, to some extent, it was surface water which flowed down from a hillside above; it was held that an instruction that if the jury could not determine what part of the damages was caused by the water from the tank, they could in no event find for the plaintiff more than nominal damages, was erroneous. Chicago & Northwestern R. Co. v. Hoag, 90 Ill. 339. In Moss v. St. Louis, Iron Mountain & Southern R. Co., 85 Missouri, 86, it was held that where a railroad company condemns land for its right of way by proper methods, and without negligence, unskilfulness, or mismanagement, constructs its road, and the embankment therefor, obstructing no natural channel of water thereby, the injuries done by such embankment, by causing water to flow over the land of adjoining proprietors, will be regarded as the natural incidents and consequences of that which the corporation, by reason of condemning the land, had acquired the lawful right to do. For such injuries no action will lie, damages for them being assumed to be included in those already assessed. The right of a railway company, after having constructed its roadbed, to make such changes in it as experience may designate as proper, is, of necessity, a continuous one.

CHICAGO AND ALTON R. Co.

v.

GLINNEY.

(*Advance Case, Illinois. November* 13, 1886.)

Where a railway company digs ditches along its right of way, whereby surface water is diverted, and plaintiff's land is flooded, but such flooding is increased by the drainage of lands adjacent to the railway, by artificial ditches discharging into the railway ditch, without the company's consent, the company is not liable for the increased damage caused by such means, without its consent.

APPEAL from appellate court, second district.
C. Beckwith for appellant.
Wing & Goodspeed for appellee.

CRAIG, J.—This was an action brought by Dennis Glinney against the Chicago & Alton R. Co., to recover damages for an alleged diversion of water by the company from its natural course, resulting in an injury to a certain portion of a tract of land owned by the plaintiff. The plaintiff, as appears from the record, owns the N. E. one fourth of section 4, township 32, range 9 E. of the third principal meridian, in Will county. The railroad runs northeast and southwest through the township. Coming from the north, it enters the township near half section line of section 3, and it leaves the town on west line, near half section line of section 19. The road, as located, does not run over any part of plaintiff's land. The nearest approach to plaintiff's land is at the southeast corner, where it is ten rods distant from the quarter corner. Killgore slough heads about three quarters of a mile south east of the railroad in this township. It runs across the railroad, and crosses the plaintiff's land, running in a northwesterly direction, until it empties into the Claypool run, several miles distant from plaintiff's land. The land in the locality is generally flat, but at the same time it slopes gradually from the southeast to the northwest. Braidwood is located on sections 7 and 8, some two miles southwest of plaintiff's land. Between plaintiff's land and Braidwood there are certain valleys and corresponding ridges, running from southeast in a northwest direction. In the construction of the railroad across these depressions the flow of water was to some extent, no doubt, interrupted, and the railroad company, for the purpose of relieving its track of water, 15 years before the commencement of this action constructed a ditch along

FACTS.

the east side of its track, from a point a short distance south of Braidwood to Killgore slough. In consequence of the construction of this ditch, the plaintiff claimed that the volume of water in Killgore slough has been increased to such extent that, in a wet season of the year, the slough overflows upon a portion of his land, and that some 45 acres of the west half of northeast quarter of section 4 has been seriously damaged; that prior to the construction of the ditch it was fine meadow-land, but since that time it has become almost worthless.

On the trial of the cause, among other defences, the railroad company claimed that other persons had constructed drains into the ditch which it had constructed along its line of road, and thus greatly increased the flow of water into Killgore slough, and that the railroad company could not be held responsible for such increased flow of water. Upon this branch of the case the witness Riley, on his cross-examination, testified as follows: "The water complained of comes from off the prairie,—off section 17. Section 17 lies southeast of Braidwood. They opened ditches, and let the water from section 17 into the railroad ditch. I don't know who opened the ditches; the railroad company did not. The water from section 17 would not have hurt me or Glinney if it had not been let into the ditch. There is a ditch cut from section 17 down to the railroad ditch. The railroad company did not cut this ditch, and there are other cuts running into this ditch. There is a road near me, with ditches on either side, which ditches run into the railroad ditch. The railroad company did not dig these ditches. There is a large body of low land to the east of the railroad, through which a road is graded, with ditches on either side, running into the railroad ditch." Thomas Connors, on the same question, on cross-examination, testified as follows: "There is another inlet close to my house. It was dug by William Henneberry. It runs considerable water into the railroad ditch. All the farmers along on the east side of the railroad ditch drain to the northwest, and the water is bound to come down into this ditch. There are ditches that drain directly into the railroad ditch along the roads, from place to place. The railroad company didn't dig those ditches. I know that the railroad ditch runs for a number of days with a steady stream of water, when we have a heavy rain." Other evidence of a like character was introduced on the trial, but it will not be necessary to refer to it here. We have alluded to the evidence for the purpose merely of showing that the record contained evidence of this character, upon which an instruction to the jury might be predicated.

Upon this branch of the case the defendant asked an instruction, as follows: "(11) The jury are further instructed that, although they may find from the evidence that the defendant, in the construction of its road, excavated a ditch on its own right of way,

along the east side of its track, through which water at certain seasons of the year is discharged and carried upon the lands of the plaintiff, the defendant is not liable for damages on account of any water that may be brought into such ditch, and discharged upon the land of the plaintiff, by artificial ditches extending into said railroad ditch, and made without the consent of the defendant. The defendant is only liable to the plaintiff for such damages as may ensue from its own acts, or the acts of its agents. And if the jury shall further believe that the waters from adjoining lands have been conducted into such railroad ditch by artificial ditches, made without the consent of the defendant, thereby increasing the flow of water through such ditch, and upon the plaintiff's land, the defendant is not liable to the plaintiff for damages caused by water artificially brought into its ditch from adjoining lands, without its consent."

This instruction was refused, and the ruling upon it presents one of the questions for decision. We are aware of no rule of law under which it can be held that the appellant is responsible for damages which did not result from its own act or omission, but more from the act of another. There was evidence before the jury that much of the water complained of which flowed down the railroad ditch had been conducted therein by artificial ditches, constructed by other parties with which the railroad company was in no manner connected. And the purpose of the refused instruction was to inform the jury that the company was not liable for damages caused by another party. The principle announced in the instruction was clearly correct. If the appellant diverted the flow of water from its natnral channel, and conducted it through a ditch which it had constructed, and emptied it into Killgore slough at a point where it might overflow appellee's lands, it may be liable for such damages as result from its own acts; but upon what principle, it may be asked, is it to be held responsible for damages caused or produced by other parties? It cannot be presumed that no person south and east of the railroad in this locality had a right to turn water into the railroad ditch, and, if they did so, it was done by and with the consent of the railroad. No such presumption prevails. We regard it as a plain proposition that for whatever damage was done by turning of water into this ditch by other parties, without the sanction or approval of appellant, they alone must be held liable. The instruction was correct, and the court erred in refusing it.

RESPONSIBILITY FOR DIVERTING WATER.

The judgment of the appellate and circuit courts will be reversed, and the cause remanded to the circuit court.

Diversion of Surface Water by Ditches.—See St. L., I. M. & S. R. Co. v. Morris, 5 Am. & Eng. R.R. Cas., 48; Shane v. K. C., St. Jo. & C. B. R. Co., 5 Am. & Eng. R. R. Cas., 64; O'Connor v. F. du L., A. & P. R. Co., 5 Ib. 82;

Hammond *v.* Port Royal, etc., R. Co., 11 Ib. 352; Texas, etc., R. Co. *v.* Sutor, 11 Ib. 506; Whyland *v.* St. Louis, etc., R. Co., 11 Ib. 543.

Surface Water—Diverted by Ditches.—While a railroad company has a right to drain surface water from its roadbed, so as to protect the same for continued and profitable use, the work must be so done as to occasion no unnecessary inconvenience or damage to the adjoining proprietor. And the latter may recover for injuries produced by mere negligence without proving malicious intent. McCormick *v.* Kas. C., St. Jo. & Council Bluffs R. Co., 57 Mo. 433.

A railroad company has no right to stop, by its embankment, the natural and customary flow of the surface water from higher grounds, and by its ditch along its track convey the same upon the premises of another over whose land its road is constructed without providing some sufficient outlet for it to pass off; and when such person's land is injured in consequence of the accumulation of such surface water on his land, the company will be liable to him for all the damages occasioned thereby. J., N. W. & S. E. R. Co. *v.* Cox, 91 Ill. 500; T. W. & W. R. Co. *v.* Morrison, 71 Ill. 616; Curtis *v.* Eastern R. Co., 98 Mass. 428.

Central Railroad

v.

English.

(78 *Georgia*, 866.)

A tenant rented certain land for the year 1877, knowing that a railroad company maintained a nuisance thereon in the shape of a pond of water, which affected the health of his family. With this knowledge, he rented the place for the year 1878, when it became more sickly, so much so that he was unable to gather his crops; and an action was brought against the railroad.

Held, that the landlord had the right to use and occupy the place, and under his lease the tenant had the same right, and he could presume that the railroad company would abate the nuisance. The law did not require him to move away, but did require the company to abate such nuisance; and it was, therefore, not error to refuse to charge that if the plaintiff could have avoided the injury to himself, he could not recover.

Where one railroad company erected a nuisance, and was subsequently leased to another company, which continued to maintain such nuisance, if the owner of the property on which it was situated notified the president and officers of the lessee company of it, and his tenant also notified the section-master of the company, this was sufficient notice and demand for abatement, and the tenant could bring an action for injuries resulting to him without more. Notice of the nuisance is sufficient.

Railroads. Damages. Negligence. Nuisance. Landlord and Tenant. Before Judge Simmons. Houston superior court. April Term, 1884.

English brought his action for damages against the Central Railroad, alleging, in brief, as follows: The Southwestern Railroad built an embankment so as to dam and pond up the waters of a certain creek, which was crossed by its track, thus rendering the neighborhood sickly and creating a nuisance. The Central Railroad leased the Southwestern road, and continued the nuisance in 1878 and 1879, thought often notified to abate it. Plaintiff leased the land on which was the pond from the owner for farming purposes in 1878 and 1879, moved thereon with his family, and planted and proceeded to cultivate it until the summer and fall months, when his family were stricken with chills and fever arising from the maintenance of the pond; and he was unable to finish the cultivation of the crop, the greater portion of it proving a loss; and some of his children died.

Defendant pleaded the general issue; that the pond existed before the plaintiff rented the land, and he had full knowledge of it, and was not entitled to recover; and that, if plaintiff had any right of action, it was against his landlord, and not against defendant.

It is unnecessary to detail the evidence further than the following: Flournoy, the landlord of the plaintiff, testified that the means of carrying off the water from the land were totally inadequate, and that the culvert built by the railroad for that purpose was too high above the creek, which ran at that point, to carry off the water effectually, and that the ditch was not cleaned out by the railroad company; also that he notified the president, superintendent, the road-master, the supervisor, and the overseer of the condition of the culvert and the backing of water on his land, and requested that it be put in proper condition. Some of these notices were were personal and others by letter. When asked if he ever gave any notice on behalf of his tenant, the plaintiff, he said that he did so notify the railroad overseer; and that he thought he had spoken to one other official of the road about the condition of the plaintiff's family and the necessity of putting the drain in proper condition, but of this he was not positive.

Plaintiff testified that he notified the section-master of the road of the condition of the pond and ditch, who replied that it was not worth while to clean it, as it would fill up every rain. (This was denied by the section-master, who also stated that he had no authority to do the work without orders from his superior officer.) It appeared that plaintiff moved on the place in 1877, and rented for that year, and also rented for 1878; that the pond was there in both years. He testified that the sickness in his family first began in the fall of 1877; that in that year he made a good crop, and planted a crop in 1878, but his family were sick and unable to work, and thereby he was unable to gather a full crop, and

was put to expense in hiring help. There was other testimony as to loss of crops, and his expenses incurred in hiring labor to take the place of his sick family were stated at about $200 to $250.

Much other testimony was introduced on both sides, which need not be stated. There was conflict on almost every material point —the cause of the pond, its effect, the loss of plaintiff, and whether the railroad company had done what was necessary in making the culvert and cleaning the ditch.

The jury found for the plaintiff $200. Defendant moved for a new trial, on the following grounds:

(1) to (3) Because the verdict was contrary to law, evidence, and the charge of the court.

(4) Because the court refused to give in charge § 3034 of the Code.

(5) Because the court refused to charge as follows: "If you are satisfied from the evidence that the plaintiff, English, rented this place in the year 1877 and lived on it, and knew all about the pond, and that it created sickness of himself and family, and after this knowledge of the existence of the pond, and that it did create sickness, he again rented the same land and resided on it for the year 1878, then I charge you that he cannot recover in this case, unless it should appear from the evidence that the size of the pond was increased by the negligence of the defendant during the year 1877 or 1878, so as to cause additional injury to the plaintiff or family or crop."

The motion was overruled, and defendant excepted.

W. S. Wallace & Son for plaintiff in error.

Davis & Riley for defendant.

BLANDFORD, J.—1. The only complaint upon the part of the plaintiff in error as to the action of the court below is, that the court refused to charge the jury, as requested, that if the plaintiff below could have avoided the injury to himself, then he cannot recover.

Under the facts of this case, we think the court did right to refuse this request. It appeared that defendant in error rented from one Flournoy certain lands for the year 1877; that he knew that plaintiff in error maintained a nuisance on this land, which was a pond of water, which affected the health of his family; that with this knowledge, he rented the place for 1878, when it became more sickly, so much so that he was unable to gather his crops.

ABILITY TO AVOID INJURY.

The landlord had the right to use and occupy this land; when he leased the same to English, he had the same rights which the landlord had; he had a right to presume that the railroad company would abate this nuisance; the law did not require him to move away, but did require the railroad company to abate the nuisance; hence the refusal to charge as requested was right.

2. The only other ground of error is, that English should have notified the Central Railroad to abate the nuisance, and that having failed to do so, he could not recover.

It is true that the Southwestern R. Co. originally erected the nuisance, and that the Central Railroad became the lessee of the Southwestern Railroad. It furthermore appears that the landlord, Flournoy, had notified the Central Railroad, after it became the lessee of this road, of this nuisance, by notifying the president and other officers of this corporation; and that English himself had notified the section-master of this nuisance. This was sufficient notice and a sufficient demand. 7 Ga. 296; Code, § 3001. If the plaintiff in error had notice of the nuisance, then this is all that is required before action brought. 7 Ga. 296.

NOTICE TO ABATE NUISANCE.

Judgment affirmed.

Nuisance of Standing Water.—See Louisville, etc., R. Co. *v.* Hays, 14 Am & Eng. R. R. Cas. 284; Hoganon *v.* St. Paul, etc., R. Co., 14 Ib. 291; Quin *v.* Chicago, etc., R. Co., 17 Ib. 68.

CHAMBERLAIN *et al.*

v.

BALTIMORE AND OHIO R. Co.

(*Advance Case, Maryland. January* 28, 1887.)

Where the plaintiffs conveyed land to a railroad company for a railroad, and in the conveyance an agreement was inserted that the company should convey the water from a spring on the land by a pipe to the south line of the road so as to be accessible for watering plaintiffs' stock, *held*, that it was not the spring in its then state which was to be preserved, but the water which issued into it.

Held further, that if the spring was destroyed by quarrying for the construction of the road, and the water thereof collected elsewhere, and was conducted to the place agreed, in equal quantity and purity and as accessible as reserved in the deed, the actual destruction of the old site of the spring gave plaintiffs no cause of action.

Held further, that the damages which plaintiffs are entitled to recover for a breach of the agreement are those sustained in not having water for their stock, and not the difference in value between plaintiffs' farm with and without the spring.

APPEAL from a judgment of the circuit court for Kent county, in favor of defendant in an action to recover damages for an alleged breach of covenant. Affirmed.

Argued before Alvey, Ch.J., Miller, Robinson, Stone, Yellot and Irving, JJ.

The case is sufficiently stated in the opinion.

H. Arthur Stump and *Albert Constable* for appellants.

John K. Cowen, *John S. Wirt*, and *Wm. Irvine Cross* for appellee.

IRVING, J.—The question presented by this appeal arises wholly upon the prayers granted and rejected at the trial, and they depend upon the true and proper construction of the agreement of the appellee, a railroad corporation, in a certain deed of the appellants to it.

QUESTIONS AND FACTS.

The tenth count of the plaintiffs' declaration, the appellants contend, presents their cause of action. It substantially charges that the appellants sold and conveyed a certain strip of land to the appellant for the purposes of its railroad, upon which was a certain spring of water at the foot of a certain hill, which spring, the appellants contend, the appellee engaged to preserve and maintain "as it existed at the time of the conveyance, so as to enable it to convey the water from said spring, by a pipe under the bed of the said railroad, so as to be accessible for watering stock on that part of the appellants' farm lying south of the railroad and bordering thereon;" and that the defendant (appellee), disregarding its agreement, has opened a quarry "on the said land and on the site where said spring is located, and totally destroyed said spring, so that it is now, and forever will be, impossible to convey the water from the spring at the foot of the hill, by a pipe under the bed of said railroad, to the south limit line of said railroad, so as to be accessible for watering stock on that part of the plaintiffs' farm lying south of said railroad and bordering thereon, by reason of the total destruction of said spring."

The deed of the appellants to the appellee made on the 24th of November, 1883, and recites as follows: "Whereas, said party of the second part has located a railroad upon and through a parcel of land, belonging to the said party of the first part, situated in the county of Cecil and State of Maryland; and whereas, the said party of the second part has paid, and the said party of the first part has received, the sum of $1500 in full payment for all the estate, right, title, interest and property which the said party of the first part now has or may hereafter have, in and to the said parcel of land, and in full satisfaction of all damages which the said party of the first part may sustain, by reason of the location and construction of said railroad upon and through said land."

Then follows the granting clause, which describes a strip of land thirty-three feet wide on each side of the centre line of the railroad, and containing in gross ten acres and a fraction.

The *habendum* clause with covenants and agreements is as follows:

"To have and to hold all and singular the said strip of land above described, with all the rights, liberties and privileges aforesaid, unto said company, its successors or assigns, to its and their own proper use and behoof forever; and the said party of the first part do further covenant that, in consideration of the premises, the said Baltimore & Ohio R. Co., its successors or assigns or any other railroad company which it may own, control or manage, either through ownership of its stock or otherwise, shall have the right and privilege at all times of maintaining and operating a railroad upon and through the strip of land hereinbefore described; and the said grantors covenant that they will warrant specially the land hereby conveyed, and that they will execute such other and further assurances as may be requisite; and said railroad company hereby agrees to construct and maintain a substantial fence on such strip of land herein conveyed, and also to construct and maintain for the use of said grantors, their heirs and assigns, a grade crossing at or near the point where the farm road crosses said railroad; and said railroad company further agrees to convey the water from the spring at the foot of the hill by a pipe under the bed of said railroad to the south limit line of said railroad, so as to be accessible for watering stock on that part of the farm lying south of said railroad."

The evidence in the case, offered by the appellants, tended to show that the appellee, by quarrying for stone on its land, had sapped the sources of supply of water which, before the quarrying and at the making of the deed, collected in the spring at the foot of the hill, or issued from the hill at that point, and had destroyed the former site of the spring; and that now, about ten feet higher than before, the water issues from crevices in the rocks and flows in a northwesterly direction from the old site, and collects in a pond partly on the appellee's land, and partly on the land of Mr. Sharp; and that from this pool or pond the appellee has piped the water to the plaintiffs' land and stock; but that, in summer, the water in the pond has a green scum on it, and is unfit for the stock to drink, and is insufficient in quantity for the purpose; and less than in the old spring.

The appellee's witnesses testified that the supply of water was from the same stream that filled the old spring, and is taken in pipes to the appellants' land and stock in abundant supply, and the quantity is greater than in the old spring; and that the water was quite as good as the old spring, and perfectly pure, and that the old site was destroyed by quarrying for stone, in the usual and proper manner for the purpose of getting stone for the construction of piers for the railroad's approach to the bridge. It was

also in proof on part of the defendant that the original plan of the road was for an embankment instead of piers, which embankment would have covered up the spring mentioned in the deed.

The appellants contend that the appellee was bound by the agreement to preserve the spring mentioned in the deed, intact and as it existed at the time of the deed's execution, and have so alleged in their narr.; and their first prayer distinctly embodies that view. The agreement of the deed is to convey "the water from the spring at the foot of the hill, by a pipe under the bed of the railroad to the south limit line of said railroad," etc. It does not in terms, say anything about preserving the spring exactly as it existed, but the appellants argue that the agreement cannot be performed without maintaining the continued existence of that spring in that spot, and that to take water from any other spot is not a compliance with the engagement. The endeavor is to bring the case within the principle of the decision of the court in Stirling *v.* Maitland, 5 Best & S. 840–842.

The appellee insists that what the appellants were contending for was preservation of a water supply for their stock from the stream which created the basin at the foot of the hill, which is designated as a "spring at the foot of the hill," and that if that supply of water has not been cut off and destroyed, but is taken to the plaintiffs' farm at another spot where the same water collects, it cannot be held to have destroyed the spring in the sense of the contract, and in violation of it. If that be the true construction of the contract, the condition of things intended to be preserved has been preserved as was required in Sterling *v.* Maitland.

Looking to the object of the railroad in buying the strip of land conveyed by the deed, and the use to be made of it, and also to the object appellants appear by the deed to have had in securing the agreement, we are all clearly of opinion that the construction of the contract contended for by the appellee and given it by the circuit court was right. It was not the basin itself, but the water springing into it, its supply, which was to be taken to plaintiffs' stock. The lines of the land conveyed not only included it within the thirty-three feet from the centre line on each side, but in addition to that which the deed expressly defines as conveyed, in further description the deed adds: "And, in addition to said strip, as much more land as may be necessary for slopes in cuts and fills, allowing one foot horizontal to one foot vertical for slopes in cuts, and one foot and a half horizontal to one foot vertical for slopes in fills."

CONSTRUCTION OF CONTRACT.

Thus it appears from the very paper itself what was to be done on the land granted; and if done on that part where the spring was, which future need could only determine, it would of necessity destroy the spring's site, although it would not prevent the

saving of the water from the stream which supplied it, and diverting it by an artificial channel and pipe as was agreed. That which the deed shows was possible and likely to be done where the spring was, the engineer witness of appellee testifies was actually contemplated, and the plan of the road required, viz.: to fill up the spring. Because the building of the road would cut off the spring from the other part of the farm where the stock would be, it was necessary to get the water to them; hence, it appears that it was not the spring in its then state which was to be preserved, but the water which issued into it. It was the water for the stock the appellants wanted taken to their stock, and which appellee engaged to give them by laying pipes under the railroad to the southern limit of the railroad's land, where it should be delivered for them. The necessities of the plaintiffs' stock was what plaintiffs were seeking provision for, and the necessities of the appellee's road in its process of construction was what appellee was providing for, and these together leave no doubt in our mind as to the true interpretation of the contract. Contracts will always be construed reasonably, and in accordance with what the evidence shows the subject-matter to be, and the consequent object of the parties to it. The extent of the obligation may greatly vary according to such proof. Anson, Cont. 2d ed. 243. The instrument itself shows what each party wanted and intended.

We think the circuit court was clearly right in rejecting the first prayer of the plaintiffs, for it presented an erroneous view of the obligation of the contract; and the second, third, and fourth prayers depended so entirely upon the first, and its theory of the duty of the appellee (which the lower court rejected, and we approved), that we think they were also correctly refused. INSTRUCTIONS CONSIDERED.

The fifth prayer of the appellants was granted, and by it the jury were instructed that if they found "that the spring, mentioned in the deed offered in evidence, supplied at the time said deed was executed sufficient pure water for the use of the plaintiffs' stock, and shall further believe that the defendant has destroyed said spring and the stream which supplied the same, or should believe that the defendant has so permanently injured said spring and stream that the supply of water is and will be hereafter insufficient for the use of the plaintiffs' stock, or so impure as to be unfit for the use of the said stock; and such impurity will be permanent, and the plaintiffs are injured thereby, then the jury may give such damages as they shall believe the plaintiffs have sustained therefrom; and if the jury shall believe that said injuries (if any) are permanent, then the jury may give such prospective damages as the jury may believe the plaintiffs will sustain."

By this instruction asked and granted, the plaintiffs obtained all

they were entitled to have, to say the least. Under a count for total destruction they secured the instruction of the jury that if they found that the spring and stream was wholly destroyed, or that the supply of water was diminished so as to be inadequate in quantity for plaintiffs' stock, or was rendered impure and unfit for the stock, they should find for the plaintiffs, in any of the then contingincies, and might give damages for injuries already sustained, and also for such as would accrue.

Upon which of the then contingencies the jury did form their verdict, we do not know, nor is it material that we should know. Having asked and obtained what they did, they cannot justly complain of the court's action in granting the defendant's second prayer, which only put the converse of their own proposition, stated in a little different form. It only asked the jury to be told that if the spring mentioned in the deed was destroyed by quarrying for the construction of the railroad, done in the usual manner and with ordinary care, and was done with with no other purpose, but that the water of the same stream which supplied the old spring collected in a pool elsewhere, and was conducted by a pipe to the south limit of the defendant's lines, in as ample quantity, in equal purity, and as accessible to plaintiffs' stock as if conveyed from the old spring, then the plaintiffs were not entitled to recover any damages after such pipe was laid, and the water was so conducted to the plaintiffs' land and stock.

The theory of the prayer is that if the water of that stream which filled the old spring or basin was conducted in the manner contracted for, to the plaintiffs' stock, although it was not brought from the particular spot where it collected in the old spring, then the actual destruction of the old site of the spring gave no cause of action. We have already indicated this to be our construction of the meaning of the contract; and regarding the question at issue as wholly dependent upon the contract and its interpretation, we have not found it necessary to consider and discuss the authorities cited in support of the proposition that the appellee had the right to mine or quarry its land, and that if, in the fair and *bona fide* exercise of that right, without sinister motive, the appellants' spring was destroyed, it was *damnum absque injuria.* As we understand the object and meaning of that agreement, that is not involved. So far as this second prayer of the defendant embraced the questions raised by the proof as to the quantity and purity of the water supplied from the new pool or spring, and its adequacy and fitness for the plaintiffs' stock, it simply follows the example of the plaintiffs' prayer on the same questions, and only seeks to put the converse result to the jury, if they should not find —as the plaintiffs contended they must—on the proof; and we are unable to see any just ground of complaint because the instruction was granted.

As to the special exception thereto, for the want of evidence to support it, we need only say that the plaintiffs' fifth prayer assumes that there was evidence on those subjects, and there certainly was; and if there was to sustain it there was also to sustain the second of the appellee. There was evidence each way.

The fourth prayer of the appellee, as to the measure of damages, which was granted, also forms part of appellants' complaint. It reads thus: "If the jury find that the defendant has failed to convey the water from the spring mentioned in the deed to the south limit of defendant's land so as to be accessible to stock on the plaintiffs' land, then the damages which the plaintiffs are entitled to recover for this failure on the part of the defendant is the the damage sustained by the plaintiffs in not having water for the use of their stock."

Upon the theory upon which the case was tried this was certainly the measure of plaintiffs' damages. The needs of the stock seem to be the moving cause for the agreement as we read it; and that seems to be the view of the narr. Inadequate supply and unfitness for the stock are presented by the plaintiffs' fifth prayer as the question for the jury to pass upon; and the inquiry in that regard is, what damages are asked for? Damages in that regard alone were to be considered, and therefore a prayer which asked, as did the fourth of the plaintiffs, that the measure of damages was the difference in value between the farm with and without the spring, was clearly erroneous; for it would include the value of the spring for any and for all purposes as affecting the value of the farm, and would naturally mislead the jury. We find no ground for reversal, and the judgment must be affirmed.

Judgment affirmed.

Right of Way—Injury to Spring.—See Winklemans *v.* Des Moines, etc., R. Co., 19 Am. & Eng. R. R. Cas. 186.

Diverting Water of Springs—When Actionable.—A party is liable to an action for diverting the water of a spring which ran in a well-defined channel into a stream supplying a mill, at the suit of the mill-owner, notwithstanding he had permission from the owner of the land where the spring arose. But not if the spring spreads out upon the land, having no channel. As the land-owner might drain his land, so he may give permission to others to do so. Duddon *v.* Guardians Herndon Union, 1 H. & N. 627; Robinson *v.* N. Y. & Erie R. Co., 27 Barb. (N. Y.) 512; Strohecker *v.* Alabama, etc., R. Co., 42 Ga. 509. But it must have the same condemned and pay for it; and it has no right, by means of pipes or otherwise, to divert the water of a stream for its uses to the detriment of a lower mill-owner. Garwood *v.* N. Y., etc., R. Co., 83 N. Y. 400; 38 Am. Rep. 452.

HOOPER
v.
COLUMBUS AND WESTERN R. CO.

(78 *Alabama*, 213.)

A written agreement between a railroad company and the owners of certain town lots, through which the track of the railroad had been laid without any legal proceedings to condemn the land; by which the company agreed to pay a specified sum of money, and to do certain grading and other work on the adjacent lots of the owners, who, "in return," agreed to "give" the company the right of way through the lands, vests in the railroad company only an equitable title, leaving the legal title in the owners.

In ejectment, or the statutory action in the nature of ejectment, the legal title must prevail, and the court cannot take cognizance of an equitable title.

A railroad company, having constructed its road through plaintiff's lands, without objection by him, under an executory contract for the purchase of the right of way, cannot defeat an action of ejectment founded on his legal title, by proof of facts which would constitute an equitable estoppel.

APPEAL from the circuit court of Lee.

Tried before the Hon. H. D. CLAYTON.

This action was brought by George D. and George W. Hooper, suing jointly, against the Columbus & Western R. Co., to recover the possession of certain town lots in Opelika, through which the track of the defendant's road ran, and was commenced on the 17th April, 1882. As to the lands of which it had possession, the defendant pleaded not guilty, and a special plea in these words: "As to the lands on which said railway company has its right of way, defendant says, that the former corporation, the Savannah & Memphis R. Co., contracted with plaintiffs for the same as a right of way, paying them down the sum of $375 on the purchase of the same; and said plaintiffs agreed to wait for the balance of said purchase-money, being certain work on said lands, which said agreement and contract bears date on the 6th day of September, 1870, and is hereto attached, marked Exhibit A, and made a part of this plea; and postponed the payment of the same to a future day, and permitted the said railroad company to take possession of said lands under said agreement, and to build not only the railroad on and across said lands mentioned in said complaint, but a line of road for sixty miles beyond; and this defendant claims title and possession through and under said Savannah & Memphis R. Co.

The agreement mentioned as Exhibit A, which was signed by Samuel G. Jones as president of said railroad company, and by the plaintiffs, was in these words: "Memorandum of agreement made

between G. D. & G. W. Hooper on the one part, and the Savannah & Memphis R. Co. on the other part, the 6th September, 1870. (1) The said railroad company shall pay to the said Hoopers, in cash, the sum of $375. (2) Said company to fill, level, and grade every street which leads to or around Block A (whereon said G. D. Hooper resides) which is cut by said railroad, in such manner and to such extent as to make the crossing of said railroad by each of said streets as ample and convenient as it is possible to make them consistently with the running and use of said railroad; and this grading, filling and building to extend to the width of twenty-five feet, and to be always kept up by the said company; provided, however, that a bridge, if deemed advisable by both parties, may be built by the company across the railroad on Washington street. (3) And in return the said Hoopers are to give the said company the right to run their road through the said block, on the road-bed as at present graded, and to the use of all of lot number four (4) on the north side of said track, and the right of way on lot number (4) to the extent of twenty-five feet from the centre of said railroad track, on the south side of said track. (4) The said railroad company agrees to perform all the work above described to be done by them, by the 1st June, 1871; and it is agreed that, for any failure in said performance, after the 1st June, 1871, they shall pay the said Hoopers the sum of one dollar per day, for each day they are in default. (5) The said Hoopers reserve the right to remove all the fencing and buildings from said lot four (4); and the company will allow no railroad hand or employee to interfere with, or assist in the same. (6) Each of said parties binds himself, on the reasonable request of the other party, to make any deed, conveyance, or writing in solemn form, which shall secure to the other any and every right to which the other may be entitled on a fair construction of this agreement. (7) The said Hoopers will move to withdraw and dismiss, without prejudice, their bill in chancery against said company, the company agreeing to pay the costs. In testimony," etc. Indorsed on this agreement, under date of August 28, 1871, is a memorandum signed by G. D. & G. W. Hooper, in these words: "The failure of the railroad company to make crossings up to the 1st October, 1871, will not be taken advantage of, provided they are then made as specified in this agreement."

The plaintiffs demurred to this special plea, assigning eight special grounds of demurrer, but their demurrer was overruled by the court; and they declining to plead over, or to take issue on the plea, judgment was rendered against them. The judgment overruling the demurrer is now assigned as error.

S. F. Rice and *John M. Chilton* for appellants.

W. H. Barnes George P. Harrison for appellees.

SOMERVILLE, J.—It is not controverted that the plaintiffs in the present action, which is one of ejectment under the statute, have the legal title to the land sued for, and that the title of the defendant—the Columbus & Western R. Co.—is merely equitable. This was settled in Hooper *v.* Savannah & Memphis R. Co., 69 Ala. 520, which involved the construction of the identical contract.

Nor is it denied that the settled rule in this State, in ordinary cases, is, that in actions of ejectment the legal title must always prevail, and that a court of law can take no cognizance of a mere equitable title. It has been uniformly held by this court, that "a court of law will not look to, or consider, the equity of a party, in opposition of the legal title of the other," and that a court of equity was the only proper forum in which the purchaser of an equitable title could protect himself by invoking the doctrine of equitable estoppel. McPherson *v.* Walters, 16 Ala. 714; Smith *v.* Mundy, 18 Ala. 182; Kelly *v.* Hendricks, 57 Ala. 193; Lehman *v.* Bryan, 67 Ala. 558; Tutwiler *v.* Munford, 73 Ala. 308.

LEGAL TITLE PREVAILED OVER EQUITABLE.

The only question then is, whether there are any circumstances under which the courts can except railroad companies from the operation of this rule, by reason of the interest which the public has in them, or on any principle of public policy originating in the peculiar nature and use of such public highways. Where the plaintiff has the legal title to a strip of land, through which he has permitted a railroad company to construct its line of road for many miles, can the company, when sued in ejectment at law, preclude the plaintiff from a recovery on the ground of estoppel? Will ejectment, in other words, lie for the fractional part of the road-bed of an extended line of railroad, over and through which the defendant is exercising the right of way, having constructed the road-bed and other improvements thereon by the consent of the plaintiff?

EXCEPTIONS CONSIDERED.

There are cases which support the view, contended for by appellee's counsel, that an equitable title can be set up by estoppel at law in cases of this character, where the plaintiff, having knowledge of the fact that a company is proceeding to construct a line of railroad over his land, allows them to expend large sums of money in such an improvement, without objection. We admit there is much force in the reasoning upon which these cases are based, and a *dictum* occurs in the case of New Orleans & Selma R. Co. *v.* Jones, 68 Ala. 48, where some countenance was given by us, *arguendo*, to this doctrine. So in Pollard *v.* Maddox, 28 Ala. 321, where the plaintiff's deed to a railroad company failed to convey the legal title to land, it was so far construed to operate as a covenant granting the right of way, as to bar the plaintiff by estoppel from claiming damages in an action of trespass at law.

We have re-examined the authorities on this question, with some doubts as to which is the sounder and better rule in such cases. McAuley *v.* Western Vt. R. Co., 33 Vt. 311; Provolt *v.* Chicago R. Co., 57 Mo. 256; Evans *v.* Missouri R. Co., 64 Mo. 453; Trenton Co. *v.* Chambers, 9 N. J. (Eq.) 471; Goodwin *v.* Cincinnati Canal Co., 18 Ohio St. 169; Mills on Eminent Domain, § 140–41. We have reached the conclusion, that the courts can make no exception, based on sound and just principles, which would exclude railroad companies from the operation of the general rule, that in actions of ejectment at law the legal title must prevail. Where property is acquired by the exercise of the right of eminent domain, whether by railroad companies or for other public use, the constitution requires that "just compensation shall, in all cases, be first made to the owner." Const. 1875, Art. 1, § 24. Prepayment of price to the owner of lands, sought to be condemned, is thus made a condition precedent, without which the title is not divested, or affected in any manner. New Orleans R. Co. *v.* Jones, 68 Ala. 48; Mills on Em. Domain, § 130. The policy of our law, therefore, is to protect the property rights of the citizen, just as effectually against seizure without compensation for public as for private uses. Smith *v.* Chicago & St. Louis R. Co., 67 Ill. 191. It is in recognition of this principle that an action of ejectment has been sustained in favor of a private citizen, against agents and officers of the general government, for lands held by them in the name and for the use of the government. United States *v.* Lee, 106 U. S. 196. While it is permitted to the government, by reason of its sovereignty, to enjoy the immunity of refusing to be sued in its own courts without its consent, all other persons, private and corporate, must stand upon a basis of equality before the law, in the enforcement and defence of their legal rights in courts of justice in this State, at least so far as is practicable. South & North Ala. R. Co. *v.* Morris, 65 Ala. 193; Home Protection of North Ala. *v.* Richards & Sons, 74 Ala. 456; Smith *v.* Chicago R. Co., 67 Ill. 191, 195.

NO EXCEPTION IN FAVOR OF RAILWAYS.

In the present case, the plaintiffs have by contract retained the title of the property for their own security, as they had the lawful right to do. If an individual were the defendant in an ordinary case, the law would hold that the plaintiffs could recover upon the strength of their legal title. So likewise, as we have seen, were the defendant an officer or agent of the general government, holding the property in the name of the sovereign for public uses; this does not preclude the legal title from prevailing, according to the better opinion. It is difficult to perceive that the public can claim an estoppel upon any other principles than an individual, for the public is but an aggregate of individuals. Its rights, therefore,

where the sovereignty is not concerned, is but the summation of the rights of a multitude of single persons. As said by a learned English judge, in a case where it was urged that a vendor's lien could not be enforced against land taken by a railroad company, "the public can have no rights springing from injustice to others." Walker *v.* W. H. & B. Railway, 12 Jur. (N. S.) 18.

We cannot see, moreover, that the public would be any more inconvenienced by the action of ejectment in this case at law, than they would by the enforcement of the vendor's lien by a court of chancery, which would result in a sale of the land by order of that court, and, in the event of its purchase by the plaintiff or any other vendee, in the placing of such purchaser in the actual possession. —2 Story's Eq. Jur. (12th Ed.), § 1231*b*.

It would be no hardship on the defendant to compel a resort to a court of equity in this case, where a bill could be maintained, if at all, only by tendering payment of the balance due by them to the plaintiffs for the land, and which they had failed to pay. Trenton Co. *v.* Chambers, 9 N. J. (Eq.) 471; Goodin *v.* Cincinnati Canal Co., 18 Ohio St. 169; Evans *v.* Missouri Railway Co., 64 Mo. 453.

The judgment is reversed, and the cause remanded.

Ejectment.—See Jones *v.* New Orleans, etc., R. Co., 14 Am. & Eng. R. R. Cas. 217; Snell *v.* Wasatch, etc., R. Co., 14 Ib. 475; White *v.* Wabash, etc., R. Co., 17 Ib. 82; Omaha, etc., R. Co. *v.* Redlick, 17 Ib. 107.

OTTUMWA, CEDAR FALLS AND ST. PAUL R. CO.

v.

MCWILLIAMS.

(*Advance Case, Iowa. March* 9, 1887.)

A railroad company having surveyed two lines, near to each other, across defendant's land, and having afterwards constructed its road on one of them, *held*, that a contract made after the surveys, but before the construction of the road, by which the owner of the land agreed to convey to the company a right of way through his land, was sufficiently certain to be specifically enforced, although it did not fix the exact location or width of the right of way, but merely described it as a right of way of necessary width, not less than 50 feet, through defendants' land, describing such land.

Nor is such description open to objection on the ground of uncertainty because using "Tp." as an abbreviation for township, and "R." for range, or because not stating whether the range is east or west, the county being given, and that fixing it.

Nor should specific performance of such contract be refused because the

value of the land taken by the company far exceeds the sum agreed to be paid, the building of the road being named in the contract as part of the consideration.

A defective description of land in a contract for conveyance may be cured by putting the vendee into possession.

A contract releasing to a railroad company a right of way of indefinite size and location, through certain land, and agreeing to convey a strip of ground by metes and bounds, by deed in fee-simple, when desired, *held* to be a contract for the conveyance of an easement merely, and not for the fee in the strip.

A railroad running through a 40-acre homestead tract, through a cut the edge of which is 95 feet from the dwelling-house, does not destroy the substantial enjoyment of the homestead as such; and therefore a conveyance of a right of way to a railroad company for such purpose is not a conveyance or incumbrance of the homestead, within Code Iowa, § 1990, and may be made by the husband without his wife joining.

APPEAL from district court, Poweshiek county.

This is an action in equity, in which the plaintiff demands the specific performance of a written contract entered into by the defendant Robert McWilliams, by which he bound himself to convey to the plaintiff the right of way for a railroad over certain land owned by him. There was a decree in the district court for the plaintiff, and defendants appeal.

Thos. A. Cheshire for appellant.

Hubbard, Clark & Dawley for appellee.

ROTHROCK, J.—1. The written contract upon which the action is founded is as follows:

"120.00.

"In consideration of one dollar in hand paid, and a further consideration of $120, to be paid before work is commenced, and of the location and construction of the Ottumwa, Cedar Falls & St. Paul Railroad, and the benefits to be derived therefrom, FACTS. I do hereby release to said railroad company the right of way through the land owned by me in sections 22 and 28. Tp. 79 R. 13, Poweshiek county, Ia., together with all necessary width for embankment, excavations, slopes, spoil banks, and borrowing pits; and I, for myself, and for my heirs, executors, and assigns, do hereby covenant and agree to and with said railroad company to convey by metes and bounds, at any time the said railroad company shall call for the same, by deed in fee-simple, a strip of ground not less than 50 feet in width on each side of the centre of the track of said railroad, over and through the above-described land.

"Witness my hand this twentieth day of August, 1883.

[Signed] "ROBERT MCWILLIAMS."

The defendants answered the petition by setting up a number of

defences, some of which are not necessary to be considered, for the reason that counsel for appellants in his argument confines himself to three grounds upon which he demands a reversal of the decree of the district court.

The first ground is that the contract is too indefinite and uncertain to be enforced by an action for specific performance. It is true the agreement does not describe the land to be conveyed by metes and bounds. But the evidence shows that the railroad was not constructed when the contract was entered into. The construction of the road had not then been commenced, but the plaintiff had surveyed two lines across the defendant's land, and staked out the centre of the lines so surveyed. These lines were nearly over the same ground, being not more than 15 or 20 feet apart. The road was afterwards constructed over the land upon one of these lines. It became necessary to make a cut for part of the way through defendant's land, and at that point the plaintiff appropriated more than 100 feet in width. It was doubtless to provide for this very contingency that the contract was not made definite in this respect. Contracts are to be construed in the light of the facts surrounding the transaction, and known to the parties. The defendants knew, by the surveys and stakes, where the road was to be constructed; and, not knowing the exact width required, they contracted for so much as would be necessary for a right of way.

CERTAINTY OF CONTRACT AS TO DESCRIPTION OF LANDS.

We do not understand, however, that counsel makes a specific claim that the contract was too uncertain in the description of the quantity of land by metes and bounds. His contention, in the main, is that the description of the land owned by defendants, and through which the road was constructed, was too indefinite and uncertain, as to section, township, and range, to authorize a decree for specific performance. He claims that the description, "sections 22 and 28, Tp. 79 R. 13, Powesheik county, Iowa," does not describe any land, because "Tp. 79 R. 13," does not locate the land anywhere. It appears to us that there is no uncertainty or indefiniteness in these contractions of words. They are in almost universal use in this State in describing lands, and everybody understands that they mean "township" and "range." It is true the contract does not state whether the range is east or west, but that was wholly unnecessary, as the land was described as in Poweshiek county, and the courts of this State take judicial notice that all the land in that county is in range west. Besides, the land is described as owned by the defendant Robert McWilliams, and the plaintiff took possession of the very land described and intended by the parties as the right of way for the railroad. It appears to us that, if we were to hold this description to be too vague, indefinite, and uncertain to authorize a decree for specific performance, we would

be without the support of any adjudged case. On the other hand there are many cases where descriptions of land, even more vague than this one, have been sustained. See Pursley *v.* Hayes, 22 Iowa, 11; Beal *v.* Blair, 33 Iowa, 318; Barlow *v.* Chicago, R. I. & P. R. Co., 29 Iowa, 276; Spangler *v.* Danforth, 65 Ill. 153; Mead *v.* Parker, 115 Mass. 413; Hurley *v.* Brown, 98 Mass. 545.

But, even if the description of the land in the case at bar should be thought liable to the objection under consideration, the defective description ought to be regarded as cured by the fact that the defendant put the plaintiff in possession of the land intended to be conveyed.

2. Next it is urged that the consideration named in the contract is so inadequate that to compel a specific performance would be inequitable and unconscionable. It is true the evidence shows that the number of acres taken and appropriated by the plaintiff far exceed in value the sum agreed to be paid. But the defendant thought, when he made his contract, that "the location and construction of the road, and the benefits to be derived therefrom," would be of value to him, and these facts are cited in the contract as part of the consideration; and the record shows that he now has a railroad station within two miles of his home, and that, before the plaintiff's railroad was constructed, the nearest station was nine miles and a half away. It is notorious that many of the railroads in this State were constructed in part, at least, by donations of right of way and money by subscription, as well as by taxation. There is nothing in the facts of this case to cause a court of equity to hesitate to decree a specific performance, as that the contract is inequitable, unconscionable, or founded in fraud. CONSIDERATION.

3. One 40-acre tract through which the railroad is constructed is the homestead of the defendants. The defendant Margaret McWilliams did not sign the contract. She is the wife of Robert McWilliams, and she claims that the contract is void because it is an obligation to convey a part of the homestead in fee-simple, and she did not concur in or sign the contract. It is provided by section 1990 of the Code that a conveyance or incumbrance of the homestead is of no validity, unless the husband and wife concur in and sign the same joint instrument. But it was held in the case of Chicago & S. W. R. Co. *v.* Swinney, 38 Iowa, 182, that the husband can convey a right of way over the homestead without the concurrence and signature of his wife to the deed, when such conveyance will not defeat the substantial enjoyment of the homestead as such. It is insisted, however, that in the case at bar the substantial enjoyment of the homestead is defeated because the railroad is in a deep cut, through the homestead 40 acres, and is so near to the dwelling-house as to be a great annoyance and damage, and the land actually taken by plaintiff is greatly HOMESTEAD—CONVEYANCE.

in excess of 100 feet in width; and other inconveniences and damages are enumerated as resulting from the construction and operation of the road. In the cited case it is said that "the right of way is but an easement, and does not pass the title;" and that, "if the homestead was a single lot, and the right of way occupied it all so as to destroy the homestead, or defeat its occupancy, the case would be very different." In the case at bar the defendants still occupy and possess their homestead. It is true their home would perhaps be more desirable if the railroad had been built further away from the house. The edge of the railroad cut is about 95 feet, and the track about 144 feet, from the dwelling-house. It ought not to be claimed that this is either a destruction of the homestead, or defeats its occupancy as such.

The contract recites that the land to be conveyed is for a right of way for a railroad. It also provides that the right of way is to be conveyed by deed in fee-simple. The learned judge before whom the case was tried granted a decree for a right of way deed, and not deed in fee-simple. This appears to be in accord with the case of Barlow *v.* Chicago, R. I. & P. R. Co., *supra*. The purposes for which the land was to be used, and the object of the plaintiff in securing the contract, was to procure a right of way, and not a fee-simple title to the land.

The decree of the court below is affirmed.

Specific Performance.—See Texas, etc., R. Co. *v.* Circuit Judge, 11 Am. & Eng. R. R. Cas. 584; Shenandoah V. R. Co. *v.* Lewis, 12 Ib. 305.

Contracts of Right of Way—When Specific Performance Enforced.—The defendant having entered into an agreement to sell the plaintiffs, a railroad corporation, "the land they take on the northerly side of the M. turnpike, adjoining T's land, at twenty cents per square foot so taken by said company," and the plaintiffs having brought a bill in equity for a specific performance; it was *held*, that the agreement was not for a sale of the land generally or of such part of it as the plaintiffs might elect, or of such as they should accept the offer; but for the sale of such a part of the land described as the plaintiffs might take in the exercise of the authority conferred on them by law to take land for their road. Boston & Maine Railroad *v.* Babcock, 3 Cush. (Mass.) 228. Where the contract for the purchase for a public purpose, as a highway, railroad, canal, park, etc., remaining altogether unexecuted, is subsequently abandoned by the purchaser, and the vendor retains possession of the estate agreed to be sold, his remedy is at law and not in equity. Whitney *v.* City of New Haven, 23 Conn. 624.

PENNSYLVANIA CO.

v.

ERIE AND PITTSBURG R. CO.

(108 *Pennsylvania State*, 621).

In 1858 the E. & P. R. Co. in consideration of certain absolute releases of right of way, for a nominal sum by A, B and C, agreed by parol to give to them and their families annual passes during their lives. In 1870 the company leased its entire road to the P. R. Co., the lease reciting that the E. & P. R. Co. do "assign and transfer to said second party all the contracts of the first party made prior to March 1st, 1870," and that the P. R. Co. are to "have and hold the said railroad property, real, personal and mixed, with the appurtenances and corporate rights and franchises as aforesaid, etc. The same to be free and clear (except the bonds of the first party secured by mortgage) from all debts, dues, claims and liabilities incurred or owing by the first party prior to March 1st, 1870," in consideration of which the P. R. Co. agreed to "keep and fulfil all and singular the obligations and covenants of said contracts, and which the first party could be required to fulfil and perform." In 1873 the P. R. Co. assigned this lease with the rights it secured to the P. Co., "subject, nevertheless, to all covenants in the said indenture of lease contained, which on the part of the P. R. Co. are to be kept and performed." The P. R. Co. and the P. Co. continued to issue passes to A, B and C for three years after the original lease, and then refused to do so any longer. Suits were brought thereupon by A, B and C against the E. & P. R. Co. on account of such refusal and breach of contract, and damages were recovered which were paid by the E. & P. R. Co. The P. Co. had notice of these suits, and took part in the defence. An amicable action with waiver of trial by jury having been brought by the E. & P. R. Co. against the P. Co. to try the liability of the defendant to pay the plaintiff the amount of these judgments:

Held, that though the releases of right of way were such contracts as were embraced in the original assignment to the P. R. Co., yet the parol agreement to give passes, not being a part of the release, and merely evidencing a debt of the E & P. R. Co., was not properly the subject of an assignment, and that the obligation to comply with it must be classed with the "debts, dues, claims and liabilities" of the E. & P. R. Co., from which the assignment was to be free and clear, and that there was no liability on the part of the P. Co. to the E. & P. R. Co. for the judgments obtained against the latter company by A, B and C;

Held, also, that the fact that the P. R. Co. and the P. Co. for several years issued passes to A, B and C, and took part in defending the actions brought by them, was not admissible to show the construction put upon the contract by the parties themselves, there being no ambiguity or uncertainty in the expression thereof.

ERROR to the court of common pleas of Erie county: January Term, 1885, No. 106.

February 4, 1885. Before MERCUR, C.J., GORDON, PAXON, TRUNKEY, STERRETT and CLARK, JJ.; GREEN, J., absent.

Amicable action by the Erie & Pittsburg R. Co. against the Pennsylvania Co., in which it was stated that "the matter to be tried is the liability of the defendant to pay to the plaintiff the amount of three judgments recovered in the court of common pleas of Crawford county" against the Erie & Pittsburg R. Co. in favor of William Gibson, James McMasters and William Douthett for $2100, $302.50 and $500 respectively, with interest and costs. The parties agreed in the amicable action to waive a trial by jury under the provisions of the Act of April 22, 1874 (P. L. 109), and to try the case before Church, P.J., of the thirteenth judicial district, without any formal pleadings.

The facts of the case were not disputed, and are stated in the opinion of this court, *infra.*

The points submitted by the plaintiffs, with the answers of the court thereto, were as follows:—

1. That the defendant under the agreement with the Pennsylvania R. Co., dated April 1, 1873, by which the Pennsylvania R. Co. sold, assigned and transferred the lease and contracts between the Erie & Pittsburg R. Co. and the Pennsylvania R. Co., dated March 24, 1870, the defendant is liable to the plaintiff in this case for the amount of debt, interest and costs of the three judgments recovered in the court of common pleas of Crawford county, in favor of William Gibson, James McMasters and William Douthett against the Erie & Pittsburg R. Co., with interest thereon from the time of payment by the plaintiff.

Answer.—This point is answered in the affirmative.

2. Under the said contract of April 1, 1873, the defendant became bound to keep and perform all and singular the covenants and agreements contained in the agreement and lease dated March 24, 1870, between the Erie & Pittsburg R. Co. and the Pennsylvania R. Co., which were be kept and performed on the part of the Pennsylvania R. Co., and the defendant having had notice of and defending the three suits, is liable to the plaintiff for the amount of said three judgments, with interest thereon from the time of payment by the Erie & Pittsburg R. Co.

Answer.—This point is answered in the affirmative.

3. The causes of action of Dr. William Gibson, James McMasters and William Douthett being for unlawful acts of the Pennsylvania Co. while operating the Erie & Pittsburg Railroad under said lease and contract, the plaintiff is entitled to recover in this suit.

Answer.—This point is answered in the affirmative.

The defendants submitted the following points:

1. The agreement between Dr. William Gibson, James McMasters and William Douthett and the Erie & Pittsburg R. Co. being a parol agreement, and no notice of such agreement being given

the Pennsylvania R. Co. at the time of executing the lease with the Erie & Pittsburg R. Co., said Pennsylvania R. Co. would not be bound by said agreement, and the Pennsylvania Co., its assignee of said lease, would stand in the same position as the Pennsylvania R. Co.

Answer.—Under the facts and circumstances of this case this point is answered in the negative.

2. By the terms of the lease the Erie & Pittsburg R. Co. leased to the Pennsylvania R. Co. the franchises, right of way, etc. The latter company could in no way be charged with the expenses of the purchase of the right of way, and consequently could not be bound to pay Dr. Gibson and others for land used for the right of way in money or transportation of these families, which is the equivalent of money. This would be paying rent for the property and paying for the property also.

Answer.—This point is answered in the negative.

3. The agreement between Dr. Gibson and others, and the Erie & Pittsburg R. Co. would be in the nature of an unrecorded mortgage, of which the lessors had no notice at the time of the lease, and, therefore, not binding on them.

Answer.—This point is answered in the negative.

4. By the terms of the lease the Pennsylvania R. Co. were to have the Erie & Pittsburg R. Co.'s property free and clear from debts, dues, claims, and liabilities incurred or owing, prior to the 1st of March, 1870 (except the bonds of the Erie & Pittsburg R. Co.), therefore the Pennsylvania Co. could not be held for the claims of Dr. Gibson and others, their remedy being with the Erie & Pittsburg R. Co.

Answer.—The latter clause of the point being a *non sequitur* of the first clause, the point is answered in the negative.

The court filed the following conclusions of law:

From the answers given to the several points submitted by counsel, it will be perceived that I have concluded that the plaintiff, the Erie & Pittsburg R. Co. is entitled to recover from the defendant, the Pennsylvania Co., the amount of the judgments, interest and costs, that it paid to the several plaintiffs in the suits mentioned in the "finding of facts." It only remains therefore to give briefly my reasons for arriving at such conclusions.

It may be noted that I have been assisted to this result by no analogous cases. I have been cited to no authority by the respective counsel, and a diligent search on my own part, through text-books and digests, has failed to furnish me any precedent for the situation in this case. A careful study of the lease and contract between the parties indicated to me that the law of the case is with the plaintiff. The agreement between the Pennsylvania R. Co. and the Pennsylvania Co., of the 1st of April, 1873, whereby

the Erie & Pittsburg R. Co.'s lease was assigned to the Pennsylvania Co., provides that the latter company will at all times truly keep and perform the covenants and agreements in the said lease to be kept and performed by the Pennsylvania R. Co.; and they acquired their title to the lease, and to the railroad thereto, under and subject, as stated in the agreement, to all covenants in said indenture of lease contained, and which on the part of the said Pennsylvania R. Co. were to be kept and performed.

Whatever, therefore, of obligation and burden was imposed upon the Pennsylvania R. Co. by its lease of the Erie & Pittsburg R., was accepted and undertaken by the Pennsylvania Co., this defendant.

The lease of the Erie & Pittsburg R. Co. to the Pennsylvania R. Co. of March 24, 1870, assigns and transfers to the second party all contracts of the first party made prior to the 1st of March, 1870, and it also provides that the second party in consideration thereof, *inter alia*, shall keep, perform, and fulfil all and singular the obligations and covenants of said contracts, and which the first party could be required to fulfil and perform.

If, therefore, there were any contract or contracts (whether in writing or by parol), made by the Erie & Pittsburg R. Co. prior to the 1st of March, 1870, they became the property of the Pennsylvania R. Co., and the latter on its part was obliged to keep and perform all the obligations and covenants thereof, in so far as the Erie & Pennsylvania R. Co. could be required to perform them.

This much seems to be very plain according to the strict, literal reading of the provisions of the lease.

It is true that the lease provides that the railroad property leased shall be free and clear from debts, dues, claims and liabilities incurred or owing by the lessor prior to the 1st of March, 1870. Yet the obligatory clause referred to provides for executory contracts which were to be fulfilled from time to time after March, 1870, and these pass contracts were to be fulfilled after March, 1870. The responsibilities, the nonfulfilment of which was the subject of the above suits, were all burdens to be carried after March, 1870. The contracts made by the Erie & Pittsburg R. Co., by which they were compelled to pay this large sum of money, were debts and claims owing by it after the first day of March, 1870, and after the first day of January, 1874, and were therefore contracts and responsibilities not contemplated by the provisions for exemption from the burthens of the leased property. Moreover, the Pennsylvania R. Co., or rather the Pennsylvania Co., having accepted the burthen of the former's contract, were required to keep, perform, and fulfil all the obligations and covenants of the contracts made by the Erie & Pittsburg R. Co., and made concerning their railroad and right of way. The suits were

brought and damages recovered for the breach by the Pennsylvania Co. of the contract made by the Erie & Pittsburg R. Co., yet the Erie & Pittsburg R. Co. broke no contract, although under the peculiar exigencies of the facts and the law they were mulcted in damages by reason of the breach of the contracts on the part of this defendant company. The Pennsylvania Co. broke the contracts for which the Erie & Pittsburg R. Co. suffered. Under every principle of justice and equity, why should not the violator of the contracts which it had covenanted to fulfil and perform, be compelled to answer in damages for such violation?

It appears in evidence that the Pennsylvania Co. were called upon to defend and did defend these suits which had been brought in consequence of their own illegal act, and they had every opportunity to know their obligations in the premises. The Pennsylvania Co. and its predecessor in operating the plaintiff's road, certainly knew of the existence of these contracts for passes, and during the years from 1870 to 1873, both inclusive, acted under this knowledge, and undertook to carry out, and did carry out, these contracts, by the giving of these passes to the persons entitled. In so far as we are able to judge, the refusal of the 1st of January, 1874, to continue the giving of these annual passes was arbitrary and unjustifiable, and was something for which the original contracting party was in no wise responsible.

It is said that the compelling of these lessees of the plaintiff's road to give these passes, or the recovery of damages for the non-giving of the passes, is to compel the lessee to pay for the property and also to pay rent for the property. I cannot see that this position is well taken. It might well be that if the Erie & Pittsburg R. Co. had originally paid for the right of way the money value of these several passes, such sum so paid would have been added to the cost of the road, and therefore to the capital stock, or the bonded debt of the company, in which event, according to the terms of the lease, the lessees would have been compelled to pay so much more annual rental, being the interest on the capital stock and upon the outstanding mortgage bonds of the company. Hence, they would lose nothing by being compelled to carry into effect these pass contracts.

Under all the circumstances of the case, therefore, I conclude that the plaintiff is entitled to recover from the defendant the aggregate amount of the debt, interest and costs recovered by Douthett, McMasters and Gibson against the former company, with interest thereon from the time the same was paid by the same company.

The court entered judgment accordingly in favor of the plaintiff for $5411.50, with costs. The defendant thereupon took this

writ, assigning for error the answers to the above points submitted by plaintiff and defendants, and also the general opinion of the court above stated.

J. Ross Thompson for the plaintiff in error.—The lease provided that the defendants, the lessees, were to have and to hold the railroad property free and clear from all debts, dues, claims, liabilities, etc. The right of Gibson *et al.* to recover against the Erie & Pittsburg R. Co. was a claim against or liability incurred by that company prior to March, 1870. If the consideration of their release had been for money it would not be argued that the Pennsylvania Co. would have been liable for it. The consideration was, in fact, for free transportation or a service rendered in lieu of money, and, therefore, included among the debts, dues, or claims above-mentioned.

The agreement was entirely in parol, and the defendants had no notice of it. They had a right to presume that the releases had been paid for; and in fact such was their belief. The claim is in the nature of an unrecorded mortgage, for which they would certainly not be liable. It is true that passes were issued for a time to these parties, but that was done under a misapprehension of the facts. When it was understood that they were demanded as of right no more were issued.

F. F. Marshall for defendants in error.

CLARK, J.—The Erie & Pittsburg R. Co. on the 24th day of March, 1870, by writing under seal leased its entire road, with the rolling-stock, equipments and effects, together with all its rights and franchises, to the Pennsylvania R. Co. for a term of nine FACTS. hundred and ninety-nine years, from and after the first day of March, A.D. 1870, and transferred to the same company all its contracts made prior to that date. On the first day of April, 1873, the Pennsylvania R. Co. assigned the lease and the rights it secured to the Pennsylvania Co., the defendant in this suit, "subject, nevertheless, to all covenants in the said indenture of lease contained, which on the part of the Pennsylvania R. Co. are to be kept or performed," which covenants the Pennsylvania Co. assumed.

The line of the Erie & Pittsburg R. Co. runs through the lands of William Gibson, James McMasters, and William Douthett, landowners in Mercer county, who in the year 1858 released the right of way to that company. Although these releases expressed but a nominal consideration, it appears that at the time they were taken the company verbally agreed to issue to each of the persons named, annually during his lifetime, a pass which would entitle him and the members of his family to a free passage over the line of the road. This parol agreement was in each case the consideration of

the contract to release the right of way, but no such consideration was written in the release. The Erie & Pittsburg Co., until the execution of the lease, complied with the terms of their agreement, and the Pennsylvania R. Co. and the Pennsylvania Co., while operating the road under the lease, continued to issue the passes until the first day of January, 1874, when officers of the Pennsylvania Co. having, as they alleged, consulted their contract and acquainted themselves with the nature of the claim of the landowners, declined to give passes after that date. Thereupon, three several actions were brought by the said William Gibson, James McMasters, and William Douthett against the Erie & Pittsburg R. Co., in the common pleas of Crawford county, to recover damages for the breach of the parol agreement. In these actions judgments were obtained against the said company in the aggregate amount of $4085.90, which the Erie & Pittsburg Co. have since been compelled to pay. The present amicable action is therefore resorted to, to recover from the Pennsylvania Co. the amount of money which they have been obliged to pay by reason of the refusal of that company to issue the passes according to the parol agreement referred to.

Formal pleadings, by agreement of the parties, were dispensed with, and the right of trial by jury waived, and the case referred under the act of 22d April, 1874. No specific form of action is designated in the agreement, no case stated for the opinion of the court, no pleadings filed, and we are left, therefore, to conjecture as to the form intended to be pursued. We are informed that "the matter to be tried is the liability of the defendant to the plaintiff for the amount of three certain judgments recovered in the court of common pleas of Crawford county," particularly mentioned, "under a certain lease and contract made between the Erie & Pittsburg R. Co. of the one part and the Pennsylvania R. Co. of the other part, dated the 24th March, 1870, and assigned by the Pennsylvania R. Co. to the defendant, under which contract and assignment the defendant operates the Erie & Pittsburg Railroad." No express contract relation is alleged to subsist between the parties; the plaintiffs say that they have been obliged by law to pay these judgments, and that the payment was in relief of the defendant; we therefore assume that the action is in assumpsit for money by the plaintiff paid out and expended for the defendant's use.

That the payment was not voluntary is admitted, but whether it was made in relief of the defendant is the matter to be determined. The whole question turns upon the proper construction of the original lease or contract of 24th March, 1870, between the Erie & Pittsburg R. Co. and the Pennsylvania R. Co. By the express words of the assignment the Pennsylvania Co. held "under and

subject to all the covenants in the said indenture of lease contained, and which on the part of the Pennsylvania R. Co. are to be kept and performed."

The full measure of the defendant's responsibility is set forth in the following clause of the assignment: "And the said Pennsylvania Co., for themselves, their successors, and assigns do hereby covenant and agree with the said Pennsylvania R. Co., their successors and assigns, that they shall and will at all times hereafter during the residue of said term well and truly keep and perform all and singular the covenants and agreements in the said indenture of lease set forth and contained to be by the said Pennsylvania R. Co. kept and performed."

No obligations were assumed by the Pennsylvania Co. other than are expressed in the contract between the original contracting parties.

Referring, then, to the original contract we find that after having leased the road, its equipments and effects, together with the rights and franchises of the company, for the term mentioned, the parties of the first part, the Erie & Pittsburg R. Co. "assign and transfer to the said second party all the contracts of the first party made prior to the first day of March, eighteen hundred and seventy, to have and to hold the said . . . contracts for and during the term of each thereof respectively."

In consideration of the lease and transfer the Pennsylvania R. Co. agree to work, operate, and maintain the road with its equipments, to furnish funds to maintain the corporate organization; to pay interest on the mortgage bonds, taxes, etc.; to pay annually to the lessors as therein stipulated, "and to keep, perform and fulfil all and singular the obligations and covenants of said contracts, and which the first party could be required to fulfil and perform." What these contracts were which were to be kept and performed by the lessors, or to what they related, we do not know; but we do know from the peculiar phraseology of the contract that they are the same contracts which were assigned, and no other. The releases of the right of way were certainly such contracts as were embraced in the assignment, and it cannot be questioned that the Pennsylvania R. Co., were bound to perform and fulfil all and singular the obligations and covenants therein, if any remained to be performed; but the parol agreement to provide a pass was no part of the release; the latter was an executed contract absolute and unconditional in its terms, and a transfer of it in the absence of an express provision to the contrary carried with it to the transferee no legal responsibility for the former. Each, it is true, was the consideration of the other, but they were distinct and independent; one secured a right, while the other evidenced a debt, of the company. The

CONTRACTS CONSTRUED.

contract for the passes was not properly the subject of assignment by the company; an assignment is a transfer by a party of an estate or right which he has, and not of a debt which he owes; the contracts referred to, and which the defendants were to perform, were necessarily therefore such as secured rights or estates to the company.

But the contract of lease contains another clause which clears up all possible doubt on this point. After the provisions for the lease of the road and its equipments, and the transfer of the contracts aforesaid, it is further written as follows:

"The same to be free and clear (except the bonds of the first party secured by mortgage) from all debts, dues, claims and liabilities incurred or owing by the first party prior to the first day of March, A.D., one thousand eight hundred and seventy, including the *pro rata* share of all accruing coupons for interest on said bonds and taxes, for which the first party could be liable up to said first day of March."

It cannot be doubted that the obligations of the parol agreement must be classed with the "debts, dues, claims and liabilities" of the Erie & Pittsburg Co. and from these the assignment was "to be free and clear."

It is a matter of little consequence, we think, that the Pennsylvania R. Co. and the Pennsylvania Co. for several years issued passes to the land-owners, or that they took part in the defence of the actions brought after the refusal to issue them. If there was any ambiguity or uncertainty in the expression of the contract, these acts might and would furnish some evidence as to the construction which the parties themselves put upon it, but we discover no such ambiguity as would render such evidence admissible for this purpose.

We are of opinion that under the evidence in the cause there is no liability on the part of the Pennsylvania Co. to the Erie & Pittsburg R. Co. for the judgments referred to, and that the learned referee was in error in determining otherwise.

The judgment is therefore reversed, and judgment is now entered for the defendant.

Lease of Road—Validity of Oral Agreements.—Stewart *v.* Hoyt, 16 Am. & Eng. R. R. Cas. 513; Martin *v.* N. Y., etc., R. Co., 12 Ib. 448; Kimball *v.* Boston, etc., R. Co., 13 Ib. 55.

CHICAGO, ROCK ISLAND AND PACIFIC R. CO.

v.

SMITH.

(111 *Illinois*, 363.)

The owner of a twenty-acre lot being desirous of the construction of a railroad over the same, made a deed to the railroad company, reciting that "in consideration of the premises and sixty dollars," he granted, "for the purpose of constructing a railroad, and for all purposes connected with the construction and use of said railroad," the right of way for the same, one hundred feet wide, through the lot and other property, "to have, hold and enjoy the land described, with the appurtenances, unto the said" grantee "and its assigns, forever, for all uses and purposes, ot in any way connected with the construction, preservation, occupation and enjoyment of said railroad," with a proviso for a reversion in case the same should cease to be used for railroad purposes: *Held*, that as the casting of smoke, cinders, ashes, sparks of fire, and the shaking of the soil, upon other parts of the lot, was a necessary incident of the railroad, and inseparable from the running of trains upon the railroad, the right to do these acts passed to the grantee and its successors, by necessary implication from the express grant.

Where anything is granted, all the means to attain it, and all the fruits and effects of it, are granted also, by presumption of law, and will pass inclusive, together with the thing, by the grant of the thing itself, without the words *cum pertinentiis*, and any like words.

A mere conveyance of part of a tract of land may not give the grantee the right to make any use of the part granted which will injuriously affect the remaining portion, but when the grant is expressed to be for a particular use, neither the grantor nor one claiming under him can object to such use, and recover damages resulting therefrom.

The grant of a right of way over his land by a party, to a railway company, "for all uses and purposes, or in any way connected with the construction, preservation, occupation and enjoyment of said railroad," is broad enough to embrace all uses for railroad purposes, however much increased, and by any other companies authorized by law. If such grantee company consolidates, according to law, with other companies, and thereby greatly increases the use of the right of way, the owner, or his grantee, of adjoining lots cannot recover damages caused by such increased use.

Where a person conveys a right of way over his land, it will be conclusively presumed that all the damages to the balance of the land, past, present and future, were included in the consideration paid him for his conveyance, the same as an assessment of damages on a condemnation would be presumed to embrace.

It is not necessary that a petition for the condemnation of a right of way over a tract of land for a railroad should state the petitioner's purposes fully and completely, giving the number of tracks, and a purpose to allow other companies to use the same. It is sufficient for the petition to show, generally, that the land is needed for railroad purposes.

Where a right of way is condemned for public use over a tract of land, the owner will be entitled to compensation not only for the value of the land

taken, but also for all damages to the residue of the tract, past, present and future, which the public use may thereafter reasonably produce.

The record of a deed from the owner of land granting a right of way over the same, one hundred feet wide, for any and all railroad purposes, the use for which purposes injuriously affects other portions of the land adjoining the right of way, is notice to any subsequent purchaser of adjoining lots, of the prior grantee's rights, and such purchaser will occupy no better position than his vendor or grantor.

APPEAL from the appellate court for the first district; heard in that court on appeal from the superior court of Cook county; the Hon. ELLIOTT ANTHONY, Judge, presiding.

This was an action on the case, brought by Oliver N. Smith, against the Chicago, Rock Island & Pacific R. Co., to recover for damages from the operation of its railroad. The declaration avers that the plaintiff is the owner in fee of lot 10, of Tillotson's subdivision of that part of lot 11 lying west of the Chicago & Rock Island Railroad; that the premises were of the value of $5000, and used by plaintiff as a residence; that the defendant's railroad tracks, whose operation is complained of, were constructed January 1, 1879, for use as a switching point, and have been so used since; that in the operation of the same, the defendant has unlawfully, unjustly, and injuriously caused and permitted to be thrown and deposited upon the plaintiff's property divers large quantities of smoke, cinders, soot, ashes, sparks of fire, and other noxious and injurious substances; that the soil is shaken, and that the walls of his dwelling are cracked. The plaintiff further avers, that said railroad tracks and switches have been constructed, maintained, and operated in such close proximity to plaintiff's property, that necessarily, by reason of such operation in the ordinary and usual way of operating a steam railway for the purposes for which it was constructed and maintained and operated, there has been cast upon his property the substances complained of.

Except upon the question of damages, the facts as stated below appear by stipulation of the parties.

The Rock Island & La Salle R. was incorporated by the General Assembly, February 27, 1847. Its charter authorized the company to construct, and during its continuance to maintain and continue, a railroad, with single or double track, and with such appendages as might be deemed necessary for the convenient use of the same. February 7, 1851, the act of incorporation was amended, and the Chicago & Rock Island R. created, with the same powers and privileges. August 20, 1866, the Chicago & Rock Island R. became, by consolidation with the Chicago, Rock Island and Pacific R. of Iowa, merged into the consolidated corporation known as the Chicago, Rock Island & Pacific R. Co., which latter corporation, on June 2, 1880, became, by consolidation with various other corporations, the Chicago, Rock Island &

Pacific R. Co., and vested with all the corporate and other franchises, rights, and privileges of each of its constituents. The Chicago & Rock Island R. acquired title to its right of way whose use is complained of, in 1851, by deed from F. Burcky and wife, to said company, which deed was recorded November 3, 1851. Burcky, the then owner of the whole of lot 11, "being desirous for the construction of said railroad," and in consideration of the premises and $60, granted, "for the purpose of constructing a railroad, and for all purposes connected with the construction and use of said railroad," the right of way for the same, one hundred feet wide, through lot 11, and other property in Cook county, "to have, hold and enjoy the land described, with the appurtenances, unto the said grantee and its assigns, forever, for all uses and purposes, or in any way connected with the construction, preservation, occupation and enjoyment of said railroad," with a provision that if the grantee or its assigns should "cease permanently to use said railroad so to be constructed, and the same should be abandoned, so as not to be continued over said premises," the land granted should revert to the grantor. Subsequently, that portion of lot 11 lying west of the railroad was subdivided into lots. October 1, 1873, the plaintiff went into possession of one of these lots (10) under a deed from the Tillotsons, who made the subdivision. The railroad was there when he bought. He thinks that there were at that time two main tracks and one side-track. The company's first main track was laid upon this right of way in the summer of 1852, and has existed since. Other tracks have been built upon the right of way, but at what time, except as to the two westerly side-tracks, does not appear. These two were built within five years next before the commencement of this action. All the tracks are within the limits of the right of way conveyed by said deed, and are owned, operated, and controlled by the defendant.

The defendant filed a plea of the general issue, and of the five, and twenty years statutes of limitation.

The plaintiff upon the trial claimed for damagse from the increased traffic upon the two main tracks, and from the operation of the railway upon the two westerly side-tracks. As to damages, he testified that cinders, ashes, and smoke are deposited upon the property, and go into the house when the doors and windows are open; that there is a vibration or a jarring when a train passes; that the end of the house next the railroad track has been plastered over twice; that when the mason put on the second coat, he told him to put in plenty of hair, "so that it would not fall off again, which he did;" that within the last three or four years they have had to dry clothes in the house.

There was a trial by the court without a jury; a finding for $350 damages; motions for new trial and in arrest of judgment

made and overruled, and exceptions taken. Judgment was entered, which was affirmed by the appellate court for the first district, and the defendant took this appeal to this court, the required certificate having been made.

Thos. F. Withrow and *J. C. Hutchins* for the appellant.

H. O. McDaid for the appellee.

SHELDON, J.—For the determination of this case we find that we need but to consider the one question of the effect of the deed of Burcky, made by him to the railroad company, although other questions have been urged before us.

The right of way upon which the railroad tracks in question are laid was granted through lot 11, containing twenty acres, by Burcky, the then owner of the whole of the lot, for the purpose of constructing a railroad upon it, and to be held and enjoyed forever, for all the uses and purposes in any way connected with the construction, preservation, occupation and enjoyment of the railroad. So precisely was the grant for this very purpose, and none other, that there was express provision that cesser of use for such purpose should make the land granted revert to the grantor. The casting of smoke, cinders, ashes, sparks of fire, and the shaking of the soil (the thing complained of) upon lot 11, outside of the one hundred feet right of way, was a necessary incident of the operation of the railroad. Being such, and inseparable from the running of trains upon the railroad, it was consented to, permitted, and authorized by Burcky, for a compensation paid to him, by the deed which he made containing the grant. The deed did not, in express terms, give such consent, permission, and authority, but it did so by necessary implication, in that the acts complained of were the necessary incident and accompaniment of that which was granted by the deed,—they resulted necessarily in the carrying into effect the main grant. It is abundantly settled that what the law expressly authorizes to be done cannot be complained of as a public nuisance, and we do not perceive how any more can a private nuisance be predicated of that which the individual affected by it has, for value paid to him, consented to and authorized to be done.

DEED CONSTRUED.

As to the right to cast these substances complained of, upon plaintiff's land, being given by implication by the Burcky deed, we find it laid down by Blackstone, 2 Com. 36: "For when the law doth give anything to one, it giveth, impliedly, whatsoever is necessary for enjoying the same." And in Touchstone, 89: "When anything is granted, all the means to attain it, and all the fruits and effects of it, are granted also, and shall pass inclusive, together with the thing, by the grant of the thing itself, without the words *cum pertinentiis*, or any such like

WHAT PASSES BY A GRANT.

words." In Aiken v. Boardman, 2 Metc. 463, we find the rule thus expressed: "A grant being made for a valuable consideration, it should be presumed that the grantor intended to convey, and the grantee expected to receive, the full benefit of it, and therefore that the grantor not only conveyed the thing specifically described, but all other things, so far as it was in his power to pass them, which were necessary to the enjoyment of the thing granted." And see Matter of City of Buffalo, 68 N. Y. 172; Johnson v. Jordan, 2 Metc. 240.

EFFECT OF DEED.

We regard the deed from Burcky, for the public use of this railroad, as having the same effect upon the rights of the parties, with respect to lot 11, that a condemnation of the same land for such public use would have had,—the one being a voluntary conveyance made for public use, and the other amounting to a statutory conveyance for such use. Had this right of way been acquired by condemnation, Burcky would have had made to him compensation for the strip of land one hundred feet wide taken, and also an assessment of all the damages to the residue of lot 11 to result from the operation of the railroad. The rule is, that the appraisement of damages in a case of condemnation embraces all past, present, and future damages which the improvment may thereafter reasonably produce. Mills on Eminent Domain, sec. 216, and cases cited; Chicago & Alton R. Co. v. Springfield & Northwestern R. Co., 67 Ill. 142: Keithsburg & Eastern R. Co. v. Henry, 79 Id. 280.

NO RECOVERY IN CASE OF CONDEMNATION.

It follows, that had the railroad company condemned this right of way as against Burcky, who was the owner of the whole tract, no recovery could have been had for the damages here sued for. They would have been included in the assessment of damages made on the condemnation, and whether in fact included or not, they would be conclusively presumed to have been included. The same result, we conceive, follows from Burcky's voluntary conveyance of the right of way. It is to be presumed that the contingent damages to the residue of the lot which might arise from the prudent operation of the railroad, were taken into account in fixing the price. (See Norris v. Vermont Central R. Co., 28 Vt. 99, and Conwell v. Railroad Co. 81 Ill. 233.) And herein would seem to be found sufficient answer to the position of appellee's counsel that the whole effect of Burcky's deed must be confined to the one hundred feet wide strip of land which it conveys by metes and bounds, and can have no extra-territorial operation, so as to give sanction to injuriously affecting any land of the grantor outside of the one hundred feet strip. In a case of condemnation there certainly would have followed the right to thus injuriously affect the residue of a tract of land of which a portion had been taken,

without liability for damage, and the result from Burcky's deed we hold to be the same.

The case is put by appellee's counsel that a simple conveyance of land in fee simple, without any reference to its use, would not authorize the injuriously affecting of any other land, and it then is asked if it can be claimed that when a less estate than a fee is granted, a greater effect results than if a fee is granted. The fallacy appears obvious. A mere conveyance of a tract of land might not give to the grantee the right to make any use of it which would injuriously affect any other land, for the law would attach the same condition as in general exists with respect to the holding of all land,—that the owner shall so use it as not to produce injury to another; but in the case before us there is the grant for this very use itself which will injuriously affect other land, and for no other use. The deed permits and authorizes the injurious use for a consideration paid, thus making the difference between the cases supposed, in their application to this case, of the denial of an injurious use of land and the permitting of the injurious use.

With respect to the effect of a condemnation, which has been remarked upon, it is suggested by appellee's counsel that in order to such effect the petition for condemnation should have stated its purposes fully and completely; that it should described the number of tracks, and that the company wished to permit other railroad companies to operate its tracks, etc. We do not understand that to have been necessary, or that more was required in this regard than that the petition should show tha the land was needed for railroad purposes. But without respect to what may be necessary in a petition for condemnation, the language of this deed is broad enough to cover any manner of use for railroad purposes, and without limitation as to the company.

INCREASED USE OF RIGHT OF WAY CONSIDERED.

But it is said there are here increased uses of the right of way, in respect of which plaintiff may recover; that the deed of Burcky was made to the Chicago & Rock Island Co., and that the present contention arises upon the result of the operation of the Chicago, Rock Island & Pacific R. Co., a corporation formed by uniting several other railroad companies, and that it could not have been within the intention of the grant to permit divers other railroad companies, under the license of the Chicago & Rock Island Co., to enter upon this right of way and assert rights of easement in this land. Permission to the use by other companies, and consolidations with other companies, are both authorized by statute. In dealing with the corporation, Burcky must be held to have had in contemplation the possible exercise of such corporate rights, and to have contracted with reference thereto. As before observed, the language of the grant was most broad and unlimited.

It was to hold and enjoy the right of way "forever, for all uses and purposes, or in any way connected with the construction, preservation, occupation and enjoyment of said railroad." We think all uses of the railroad for railroad purposes, however much increased, and by whomever, which are authorized by law, must be held to come within the terms and intention of the grant. Burcky being the owner of the whole of lot 11 at the time of the making of his deed, and his deed being duly recorded, it was notice of the grantee's rights to any subsequent purchaser of a portion of the lot; and such subsequent purchaser, or one acquiring a subsequent interest, would not, it is hardly necessary to remark, stand in any better situation with regard thereto than would Burcky himself had he continued to be the owner of the whole and were the plaintiff in the suit.

Several propositions of law were asked by both parties. It follows, from what has been said, that so far as they related to the question which has been considered, there was error in holding those asked by the plaintiff and in refusing those asked by the defendant.

The judgment of the appellate court will be reversed, and the cause remanded.

Judgment reversed.

Elements of Damage.—See Republican Valley R. Co. *v.* Linn, 14 Am. & Eng. R. R. Cas. 198; Bowen *v.* Atlantic, etc., R. Co., 14 Ib. 332; Kansas City, etc., R. Co. *v.* Kregelo, 20 Ib. 241.

DAY, WILLIAMS AND CO.

v.

PITTSBURG, YOUNGSTOWN AND CHICAGO R. CO.

(*Advance Case, Ohio. June* 29, 1886.)

A general deed of premises lying upon the bank of a river, in which is constructed a canal, conveys the grantor's rights to the centre of the stream bounding the property; and to reserve or exclude from the grant any such rights, the conveyance should contain proper words of such reservation or exclusion.

Where the canal company owning and operating such canal had the right only to use for canal purposes the bed and waters of such river, on ouster of such company from its corporate franchises and its dissolution by order of this court, the trustees winding up its affairs have no power to convey such rights, but they revert to the proper owners.

ERROR to the district court of Portage county, to review a judgment dismissing plaintiff's bill. Reversed.

Statement by FOLLETT, J.—The Pittsburg, Youngstown & Chicago R. Co. is a corporation under the laws of Ohio, and it was building its road through the village of Kent, in Portage county, Ohio. It was commencing to grade and build its road on property claimed by Day, Williams & Co., as partners, when, October 1, 1881, they, the plaintiffs in error, commenced an action against the railroad company and others to enjoin the railroad company from entering upon their premises until the right of way was duly condemned and paid for. The property is what was once used as a part of the Pennsylvania & Ohio Canal, and it is in the bed of the Cuyahoga river between the east bank and the middle of the river.

In their petition plaintiffs averred that they owned the premises on the east bank of the river, which premises extended to the middle of the river, and that they were extensively engaged in the manufacture of glass on the property; that the use of the water of the Cuyahoga river was indispensable to their business; that it was impossible to carry on the manufacture of glass without said water; that it was not practical to obtain water elsewhere, save at enormous expense; that the construction of the railroad as proposed, would deprive them of the use of said water, and necessitate the abandonment of their business, or the carrying it on at a loss, damage them many thousand dollars, and otherwise do them great and irreparable injury, and they prayed for an injunction and for damages.

A temporary injunction was allowed. On February 7, 1882, the railroad company set up in its amended answer:

That it admits the copartnership of the plaintiffs; that they are the owners of a glass-factory property in the village of Kent, in Portage county, Ohio; that they purchased the same from Marvin Kent, by contract in writing dated the 1st day of July, 1864, and received a deed thereof from Marvin Kent and wife, dated March 3, 1868, in pursuance of said contract and in fulfilment thereof; that the plaintiffs are engaged in the manufacture of glass; and that defendant is engaged in the construction of a line of railroad extending through said village of Kent.

The defendant denies that the west boundary line of plaintiffs' glass-works property is the centre of the Cuyahoga river.

Defendant further says that about the year A.D. 1840, a corporation duly created, organized, and then existing under the laws of Ohio by the corporate name of "Pennsylvania & Ohio Canal Company," and possessing under its charter full authority and right to construct, maintain and operate a public canal and water highway for the transportation of persons and property through the county of Portage, in the due and legal exercise of its rights and franchises in and about the acquisition of its right of way and

the construction of its canal thereon, duly obtained the right and legal authority to construct its canal in the Cuyahoga river through a portion of the township of Franklin, in the county aforesaid in which plaintiffs' said premises are located, and did construct its canal in said river from a point several hundred feet northward of plaintiffs' premises, to a point several hundred feet southward thereof. That in and about the construction of the canal, said canal company, between the points aforesaid and opposite plaintiffs' premises, constructed its towing-path in and along a portion of the original channel of said river, and thereby diverted the stream so that all the waters thereof, except that portion of the same used for the purposes of the canal, ran and flowed along the channel of the river lying and being on the westerly side of the towing-path; and the canal company constructed all and every part of the channel and bed of said river lying east of its said towing-path and between the east line thereof and plaintiffs' said premises into a canal, and maintained, used, and operated the canal so constructed from that time down to the year A.D. 1872. That the construction of said canal in the manner aforesaid permanently changed and diverted the flow of the waters of the river to the west side of said towing-path. That by reason of the acquisition of the right of way and portion of said river by the canal company, and the construction of its canal thereon as aforesaid, it cut off and appropriated all the water rights, mill privileges, and riparian rights and interests in, to, and connected with any and all lands lying on the eastern side of said river, including the premises of the plaintiffs between the points aforesaid.

The defendant further says that by the terms and provisions of its charter the canal company took the fee-simple title to all the lands, rights, and interests so acquired by it for the purposes of the canal, and that all of its rights and lands are now owned and held by the defendant as hereinafter stated.

The defendant further says that long after the construction of the canal as aforesaid, and while the same was being maintained and operated by the Pennsylvania Ohio Canal Co. under its rights, powers, and franchises, the plaintiffs purchased from one Marvin Kent all the lands and premises now owned by them, bounded and described as follows, to wit: Situate in Franklin township, Portage county, Ohio, and known as part of township lot No. 25, bounded and described as follows: Beginning at a point in the west line of Canal street in said town of Kent, where a continuation west of the south side of Mill street crosses said Canal street; thence south 18° 16′ west, 7 chains and 31½ links, to a post in the west line of Canal street; thence north 72° 30′ west, 4 chains and 21 links, to the Pennsylvania & Ohio Canal (the east bank of which is hereby understood to be what was

formerly the east bank of the Cuyahoga river); thence northerly along the east bank of the Pennsylvania & Ohio Canal to a point where the continuation west of said south line of Mill street intersects the east line of said Pennsylvania & Ohio canal; thence north 69° 45′ east, 1 chain and 58 links to the place of beginning.

That plaintiffs' deed from Marvin Kent, containing the aforesaid description and boundaries, carried the west boundary line of their premises to the east line of said Pennsylvania & Ohio Canal; that they never had or held any riparian or other rights in, to, or concerning said canal during the time the same was maintained and operated, or since; and they never took, by the terms of their deed or otherwise, any title or ownership to any portion of the bed of the canal, or to any of the land over which the same was constructed.

For further answer herein the defendant says: That it is owner of all the lands lying west of said former east bank and line of said Pennsylvania & Ohio Canal, adjoining plaintiffs' premises on the west, that were formerly owned and occupied by said canal for the purposes of the construction, maintenance, and operation of the same by said canal company. That the defendant has the title thereto by virtue of a contract in writing between it and the New York, Pennsylvania & Ohio R. Co., dated the 19th day of July, A.D. 1881, said last named company having title thereto by virtue of conveyances from the trustees of said canal company, duly executed and of record in the county of Portage. That the east line of the premises so purchased and owned by defendant is the east line of the berme bank of said canal on and along plaintiffs' premises. That the line of defendant's railroad is located and fixed entirely on its own land, lying west of said line, and in no place or part does it touch any land of the plaintiffs, or in any wise interfere with or affect the same, or any buildings or structures thereon; and the defendant has the complete right to enter upon its said premises and construct its line of railroad in the legal exercise of its franchises and powers.

In the reply the plaintiffs deny specifically many allegations of the answer, and aver that, prior to the construction of the Pennsylvania & Ohio Canal, the canal company entered into a contract with the Franklin Land Co., which last-named company then owned the premises described in the petition and held the legal title thereto; that in said contract it was provided that the canal company should construct its canal between two walls in the river, and that, between the canal and the east bank of the river, water should continuously flow from the pond created by the canal dam down to and past the premises now owned by plaintiffs for the express use, convenience and enjoyment of the owners of said premises and their assigns, and for the propulsion of valuable

mills and machinery located on said premises; that in the contract all riparian and other rights to the waters of said Cuyahoga river and the flow of the stream thereof were expressly reserved as an appurtenance of and to the premises now owned by plaintiffs and to said land company as the owners thereof and its assigns, and that said riparian rights, water privileges and appurtenances, and mill powers, property, and premises, by divers and sundry mesne grants, conveyances, and assignments, became and are the property and inheritance of the plaintiffs as appurtenant to the premises described in the petition; that such riparian rights and privileges were always recognized by the canal company as appurtenant to said premises, and were always exercised and asserted by plaintiffs and their grantors without let or hindrance from anybody and under claim of right by them.

Further replying, plaintiffs say that said Pennsylvania & Ohio Canal was substantially abandoned long previous to plaintiffs' purchase of their property and premises, that no repairs were done on the canal after 1862, and the same was suffered to get out of repair and become practically unnavigable before July 18, 1864, and the evidences were then conclusive and plenty that the same would soon be completely and permanently abandoned, and that previous to March 3, 1868, the canal had been entirely abandoned by said canal company, and suffered to become entirely useless and out of repair for the purposes of a public highway by means of said canal as a water-way, and has ever since been abandoned as a canal or public highway by means of water navigation; that for a period of more than twelve months prior to March 8, 1869, said canal had become entirely abandoned and suffered to become entirely useless and out of repair, and had entirely fallen into disuse as a canal or public highway by means of water navigation by boats or other means of conveyance upon or through the waters thereof; and plaintiffs say that at the December term, A.D. 1872, of the supreme court of the State of Ohio, in a suit therein pending in the nature of *quo warranto*, instituted by the State of Ohio on the 8th day of March, 1869, the said Pennsylvania & Ohio Canal Co. was, by the judgment, order, and decree of said court, dissolved and altogether ousted from its corporate rights, privileges, and franchises, and altogether ousted and excluded from being a body politic and corporate of and within said State, and from all and singular, and any and all rights, powers, privileges and franchises appertaining or attaching to such corporation under the laws of said State, and that said corporation was and is to all intents and purposes dissolved and dead; that thereafter neither the Pennsylvania & Ohio Canal Co. nor any other corporation or person had any right to keep or maintain in said Cuyahoga river any of the artificial obstructions built and placed

in said river by the canal company for the purposes of its canal; that these defendants can acquire no right by reason of such obstructions; that the same are unlawfully there, and unlawfully kept and maintained in the river; that if all such unlawful obstructions were removed, the larger part of the waters of said river would naturally flow against the east bank, on which plaintiffs' factories stand.

The court of common pleas made the injunction perpetual, and the action was appealed to the district court.

On trial, in the district court, it was agreed that formerly the Franklin Land Co. owned both sides of the river from the dam above this property down to a point below this property upon the river to the south end of this disputed property and including it.

"And the rights of the land company and their title, as it is conceded, was conveyed to the land company from the Franklin Silk Co.; from the Franklin Land Co. by sheriff to Zenas Kent; from Zenas Kent to H. A. and Marvin Kent; from H. A. Kent by quit-claim to Marvin Kent. And then comes the contract and deed from Marvin Kent to Day, Williams & Co.; this is the subject of the agreement."

The deed from Marvin Kent to Day, Williams & Co., as to this part of the property, was a general warranty deed, except the right to abut a dam on part thereof. This deed bounded the property as set forth in defendant's answer. The defendant clrimed title to the property it had entered upon, by virtue of its purchase from the assigns of the trustees of the Pennsylvania & Ohio Canal Co., acting in the case of State *v.* Pennsylvania & Ohio Canal Co., 23 Ohio St. 121, where that company in Ohio was dissolved and its property sold; and also by the verbal consent of Marvin Kent, given to it, to so use the property. The canal company obtained its rights in the property from the Franklin Land Co. by a contract granting to the company as follows:

"The canal company shall use the canal, dam, and waters therein for canal purposes, and the land company shall use the same dam and the water therein as well as the water passing round the lock at that point, for the propulsion of water-wheels; and in consideration further that said canal company shall locate and construct their canal so as to lock down into said canal dam and pass out of the same by a lock in the dam, thence to the south line of the lands purchased by said land company of Zenas Kent. Said canal shall be constructed between two walls in the river bed and so far from the east bank of the river as to leave a space between said east bank and the walls of the canal, of sufficient width for a convenient tail race for such wheels as the said land company or their assigns may there construct, and this race shall be excavated by said canal company the whole length to a level with the apron

under the wheels of the flouring mill bought by said land company of Zenas Kent, and pass under the canal into the river channel by a culvert at or near said south line."

The contract also permitted the canal company to take and divert "from said river such quantity of water as will be sufficient to keep said canal in a navigable state at all times when the same shall be navigated; and when the navigation of said canal shall be interrupted by frost or otherwise said canal company shall have the right to draw from said river so much water as shall be necessary for the purpose of sustaining the levels and preserving the canal, taking due care to keep the lock-gates shut and to prevent any unnecessary leakage. Upon condition, however, that the lake reservoirs shall be constructed and used in the manner recommended in the report of S. Dodge, Esq., made to the board of directors of said canal company on the 6th of July, A.D. 1835, or in the manner recommended in the report of Alfred Kelley, Esq., made to the executive committee of said board of directors, July 29, 1835, reference to said reports being hereby had," etc.

On trial the majority of the district court found that the plaintiffs were not entitled to the relief prayed for in their petition, and dismissed the same at plaintiffs' costs, without prejudice to their right to bring an action at law to recover the possession of the premises described in the petition, or such other action as may be necessary to determine their rights. A bill of exceptions was taken, and plaintiffs seek a reversal of that judgment, and the injunction prayed for, and the establishment of their rights.

Myron A. Norris and *M. Stuart* for plaintiffs.

T. W. Sanderson for defendant.

FOLLETT, J.—A correct understanding of the facts of this case set forth and shown in the statement, is necessary to the proper application of the legal principles that determine the rights of the parties.

But plaintiffs' rights greatly depend upon the true construction of the deed of Marvin Kent and wife to them, dated March 3, 1868.

And the defendant's rights depend upon what was conveyed to its grantor by the trustees of the Pennsylvania & Ohio Canal Co. after the ouster of that company by this court, as shown in State *v.* Penn. & Ohio Canal Co., 23 Ohio St. 121.

RIGHT OF DEFENDANT CONSIDERED.

I. What rights has the defendant, the Pittsburg, Youngstown & Chicago R. Co. in this disputed property? The Franklin Land Co., owned both sides of the Cuyahoga river where this property is in dispute, and while such owner it made the contract with the Pennsylvania & Ohio Canal Co., dated May 27, 1836.

The contract provided that "said canal shall be constructed between two walls in the river bed, and so far from the east bank of the river as to leave a space, between said east bank and the walls of the canal, of sufficient width for a convenient tail race for such wheels as said land company or their assigns may there construct, and this race shall be excavated by said canal company the whole length to a level with the apron under the wheels of the flouring mill bought by said land company of Zenas Kent, and pass under the canal into the river channel by a culvert at or near said south line."

It is also provided that "the canal company shall use the said canal dam and waters therein for canal purposes, and the land company shall use the same dam and the water therein, as well as the water passing round the lock at that point, for the propulsion of water-wheels; and in consideration further that said canal company shall locate and construct their canal so as to lock down into said canal dam and pass out of the same by a lock in the dam, thence to the south line of the lands purchased by said land company of Zenas Kent."

It further provided that "when the navigation of said canal shall be interrupted by frost or otherwise, said canal company shall have the right to draw from said river so much water as shall be necessary for the purpose of sustaining the levels and preserving the canal, taking due care to keep the lock gates shut and to prevent any unnecessary leakage. The canal company must locate the canal at a distance west of the east bank of the river, of sufficient width for a convenient tail race."

These provisions clearly show that the canal company took only the right to use the property west from a line west of the east bank of the river, and to use the water of the river so far only as needed for the canal. And when the canal company was dissolved this right must be regarded as abandoned and it reverted to the land company and to its grantees. Corwin *v.* Cowan, 12 Ohio St. 629; Longstreet *v.* Harkrader, 17 Ohio St. 28, 29. This left nothing that the trustees of the canal company could sell and convey, unless perhaps something that they could remove from this property; and the defendant has no rights in this property by virtue of any conveyance or sale by such trustees.

This position is fully sustained in the case of McCombs *v.* Stewart, 40 Ohio St. 647, where, as to a similar conveyance of these same trustees, it is held: "A canal company, incorporated under the act of January 10, 1827 (25 Ohio L. 3), erected across a river a dam, causing the water to flow back upon the lands of a proprietor above the dam on the stream. The company owned in fee simple, by purchase, the land on which the south half of the dam was built, but none of the land on which the

north half was built; and conveyed in fee simple to certain mill-owners the land it thus owned, and granted to them and their heirs the privilege of using the surplus water of the dam not required for canal purposes. *Held*, the right of the company, acquired by appropriation, to flow the lands of such proprietor by maintaining a dam of such height, did not, by virtue of the company's conveyance and grant to the mill-owners, survive and vest to them after the dissolution of the corporation."

In the case of Pittsburg & L. E. R. Co. *v.* Bruce, 102 Pa. St. 23, as to another such conveyance by the trustees, it is held that "the company acquired, under the conveyance terms of the charter, a right of way only over the lands appropriated by them, and that they did not acquire said lands in fee. . . . Said canal company having become insolvent, and all its property and franchises being sold to a railroad company by order of court,—*held*, that said last-named company could not construct its tracks on the right of way acquired by the canal company without compensation to the owner of the land." This company had only the right to use the property and the waters of the river for the canal, and after ouster and dissolution neither the company nor the canal remained or existed. If we disregard the form and averments of the pleadings, whether or not the defendant acquired any rights in this property through the verbal permission of Marvin Kent is determined by what rights Kent had at that time, long after his deed to plaintiffs.

II. What rights have the plaintiffs in this disputed property?

We will not stop to discuss what rights their possession gives them, though this is valuable, especially in connection with their contract and deed. On the trial it was agreed by the parties that "the Franklin Land Co. owned both sides of the river from the dam above this property down to a point below this property upon the river to the south end of this disputed property and including it. And the rights of the land company and their title, as it is conceded, were conveyed . . . from the Franklin Land Co. by sheriff to Zenas Kent; from Zenas Kent to H. A. and Marvin Kent; from H. A. Kent by quit-claim to Marvin Kent. And then come the contract and deed from Marvin Kent to Day, Williams & Co.; this is the subject of the agreement."

RIGHT OF PLAINTIFF CONSIDERED.

By this written contract Marvin Kent sold to Day, Williams & Co., "that lot of land and the buildings and improvements thereon known as the Franklin Glass Works," and he bounded the property by running the line the other way from what it is run in the deed. The contract is dated July 18, 1864, and the deed is dated March 3, 1868, and was made to cary out the contract. As to this property the deed contains a covenant of general warranty, and described the property "with the buildings and improvements

thereon, known as the Franklin Glass Works, situate in said town of Kent, and is known as being a part of township lot No. 25 in said township of Franklin, and bounded and described as follows, to wit: Beginning at a point in the west line of Canal Street in said town of Kent, where a continuation west of the south side of Mill street crosses said Canal street, thence south 18° 15′ west, 7 chains and 31½ links to a post in the west line of Canal street, thence north 72° 30′ west, 4 chains and 21 links to the Pennsylvania & Ohio Canal (the east bank of which is hereby understood to be what was formerly the east bank of the Cuyahoga river), thence northerly along the east bank of the Pennsylvania & Ohio Canal to a point where the continuation west of said south line of Mill street intersects the east line of said Pennsylvania & Ohio Canal, thence north 89° 45′ east, 1 chain and 58 links to the place of beginning, containing—acres of land, be the same more or less."

By the terms of the deed Kent conveyed to the plaintiffs all the rights he had in this property along the east bank of the river and up "to the Pennsylvania & Ohio Canal;" and then adds in parenthesis "the bank of which is hereby understood to be what was formerly the east bank of the Cuyahoga river;" and he made no reservation of any part of the bed of the river or of any water privileges. When the canal was gone there was nothing left but the river.

As early as Gavit *v.* Chambers, 3 Ohio, 496, this court held: "In Ohio, owners of lands situated on the banks of navigable streams running through the State are also owners of the beds of the rivers to the middle of the stream, as at common law." And the same is true of all streams away from tide-water.

In Benner *v.* Platter, 6 Ohio, 504, this court held: "A call in a survey for a stream not navigable is a call for the main branch of such stream, and the boundary is the middle of the stream."

In Lamb *v.* Rickets, 11 Ohio, 311, the court held: "Where the owner of land is bounded by a stream, he owns to the centre of the stream, subject to the easement of navigation." Here it was subject to the rights of the canal company.

In Walker *v.* Board of Public Works, 16 Ohio, 540, the court repeats the holding: "He who owns the land on both banks of a navigable river owns the entire river, subject only to the easement of navigation; and he who owns the land upon one bank only owns to the middle of the main channel, subject to the same easement." And also: "The legislature cannot, by declaring a river navigable which is not so in fact, deprive the riparian proprietors of their rights to the use of the water for hydraulic and other purposes, without rendering them compensation."

In June *v.* Purcell, 36 Ohio St. 306, this court went further and

held: "The principle decided in Gavit *v.* Chambers, 3 Ohio, 496, —that the owners of lands situate on the banks of navigable streams running through the State are also owners of the beds of the rivers to the middle of the stream, as at common law,—has become a rule of property, and, irrespective of the question of its original correctness, ought not to be disturbed." And in the opinion White, J., adds: "To disturb the rule now would be a dangerous tampering with riparian rights." Such is the law of England and of most of the States.

If the grantor does not intend to convey the bed of the river and the water in the watercourse bounding the land conveyed, he must insert in the instrument of conveyance proper words for the purpose of reservation or exclusion; "but in the absence of such words, the bed, and consequently the stream itself, passes by the conveyance." Ang. Watercourses, §§ 9, 17, and cases there cited. Here there was no such reservation or exclusion.

The plaintiffs had all the rights ever held by Marvin Kent in this property, and the defendant took nothing by Kent's permission.

The court erred in permitting Kent to testify as to any permission he gave the defendant in this property; and it also erred in the construction of plaintiffs' deed and of defendant's conveyance.

The judgment is reversed, and the injunction prayed for granted and made perpetual, and cause remanded.

River Bank—Right of Way—Extent.—See Lehigh V. R. Co. *v.* McFarlan, 11 Am. & Eng. R. R. Cas. 509; Reusch *v.* Chicago, etc., R. Co. 11 Ib. 559; Brunswick *v.* Union Depot St. R. Co., 14 Ib. 283.

BURROW

v.

TERRE HAUTE AND LOGANSPORT R. CO.

(*Advance Case, Indiana. September* 14, 1886.)

Although a contract not alleged to be in writing will be presumed verbal, it is sufficiently shown to be in writing, where it is averred that "a copy of said written contract is herewith filed, and made part of this answer, as Exhibit A."

A written instrument conveying to persons named a right of way for a railroad is not a power of attorney, but vests an estate in the persons named.

A written contract releasing all claims for damages, and conveying a right of way for a railroad, is not within the statute of frauds, although the right of way is not specifically described.

APPEAL from Marshall circuit court. The opinion states the facts.

G. E. Ross for appellant.

John G. Williams for appellee.

ELLIOTT, J.—There are three paragraphs of the appellant's complaint, and, although they differ in the relief sought, the *gravamen* of the causes of action is the same. The essential facts in each of the paragraphs are that the appellant is the owner in fee of the real estate described; that the appellee unlawfully asserted a right to the possession of the property, and has wrongfully invaded the appellant's rights. The affirmative paragraph of the appellee's answer alleges that it is an incorporated railway company; that in the construction of its road it became necessary to take possession of part of appellant's land; that before entering upon the land, except for the purposes of a survey, it did purchase a strip of land from William J. Myers, the grantor of the appellant; that Myers executed to it a written contract; that appellant had notice of this contract before his purchase; and that, for the consideration expressed in the contract, "Myers did relinquish and release all claims for damages by reason of the location and construction of the railway." FACTS.

It is said by counsel that "the contract or release declared on is not alleged to be in writing," and therefore must be presumed to be a verbal one. The counsel is right as to the abstract proposition of law, that a contract not alleged to be in writing will be presumed to be a verbal one. Langford *v.* Freeman, 60 Ind. 46; Goodrich *v.* Johnson, 66 Ind. 258. But while the counsel is right as to the law, he is wrong as to the fact, for the answer says: "A copy of said written contract of release is herewith filed, and made part of this answer, as Exhibit A." Where a contract is so described, it cannot, of course, be presumed to be a parol one. Following the answer is a copy of the contract referred to by the pleader, and it must be deemed a part of the pleading. Northwestern, etc., Co. *v.* Hazelett, 105 Ind. 212; s. c., 4 N. E. Rep. 582.

The entry for the purpose of making a survey was not an actionable wrong. Cooley, Const. Lim. (5th Ed.) 594.

The written contract reads thus:

"I, William J. Myers, of the county of Marshall, in the State of Indiana, in consideration of the advantages which will accrue to me in particular, and the public generally, by the construction of a railroad between Logansport, Cass county, Indiana, and South Bend, St. Joseph county, Indiana, and for the purpose of inducing the construction of such railroad, and avoiding condemnation proceedings, do hereby release and quitclaim to J. Leiter and A. D. Toner, of Kewana, Indiana, in trust for such railroad company or

companies as may cause such railroad to be constructed, the right of way, for railroad purposes only, for such railroad, described as follows, to wit: A strip of ground ninety-nine feet wide, being forty-nine and one half feet from the centre on each side of the main track of said railroad, as the same may be finally located and constructed through the following real estate in Marshall county, State of Indiana, to wit, the southwest sixty-one (61) rods in width of the north two thirds (⅔) of lot number one (1), or the northwest fractional quarter of section twenty-one (21), township thirty-two (32) north, of range one (1) east, bounded on the west by the Winamac state road as now located, and on the east by Maxinkuckee lake, containing seventeen acres, more or less. And I do hereby empower and direct the said J. Leiter and A. D. Toner to convey, by good and sufficient deed, the said right of way to the company or companies constructing said railroad; and do release and relinquish all claims for damages by reason of the location and construction of said railroad through or upon the above described real estate.

"Witness my hand and seal this sixth day of September, A.D. 1882. [Signed] WILLIAM J. MYERS.

"Executed in presence of A. B. FITCH."

It is contended by counsel that this instrument is a mere power of attorney, investing the persons named with authority to convey a right of way. We cannot so regard it. It vests in the persons named an immediate right to the real estate described and does more than constitute them agents to convey the land. In truth, the land is directly and explicitly conveyed to them as trustees, and they are authorized to execute their trust by proper conveyances. The instrument is a contract founded upon a valuable consideration, and not a mere naked license. It is, however, settled law that a license founded on a valuable consideration is not revocable, and there is here a valuable consideration, accepted as sufficient by the agreement of the parties. If, therefore, we were to hold that the instrument is only a license, the appellant could not revoke it. Strosser *v.* City of Ft. Wayne, 100 Ind. 443, see page 447; Rogers *v.* Cox, 96 Ind. 157, see page 158; Buchanan *v.* Logansport, etc., Co., 71 Ind, 265; Miller *v.* State, 39 Ind. 267; Snowden *v.* Wilas, 19 Ind. 10.

INSTRUMENT CONSTRUED.

The objection that the description of the land is insufficient cannot be maintained. It is not the offer of a description to identify the land conveyed, but to find means of identification, and that is done by the description in the instrument before us. The decision in Indianapolis, etc., Co. *v.* Ray, 69 Ind. 424, is directly in point against the appellant, and it finds support from other cases. Paul *v.* Connersville, etc., Co., 51 Ind. 527; Baltimore, etc., Co. *v.* Highland, 48 Ind. 381; Chidester *v.* Springfield, etc., Co., 29 Ill. 87.

SUFFICIENCY OF DESCRIPTION.

Contracts such as the one before us are made to carry into effect a purpose known to the contracting parties, and authorized by a public law, and they must have a reasonable construction. It cannot be known in advance where the railway will be located, and it is consequently held that, within fair and reasonable restrictions, such contracts as the present must be understood as vesting in the railway company a right to select a location.

In the additional brief filed by counsel for the appellant it is said: "There is nothing in the answer to show that appellant's title came through Wm. J. Myers; but here, again, is a mistake of fact, for the answer avers that "the plaintiff, at the time he purchased said real estate from said Myers, had full knowledge of said contract so executed by said Myers, and that the said railroad company intended to construct their said road upon said land under the right given it by said contract of release and license." As the rights of the appellee were acquired prior to its purchase by the appellant, and as he purchased with knowledge of those rights, he cannot successfully charge the appellee with an actionable wrong in exercising them. The rights of the appellee are prior in time, and it cannot be a trespasser in entering on the land for the purpose of enjoying the easement granted by the former owner of the property. If the appellant did not have a prior title and right to the land, he cannot recover; for, if the appellee has done no more than use the easement granted, it has invaded no legal right of his, and, when there has been no invasion of a right, there can be no action. It would do the appellant no good to declare its title to be in Leiter and Toner; for, if it was, then they alone could maintain an action, even if the railroad company was a wrong-doer. But the fair and just construction of this contract is that it grants an easement to the railroad company, and that for doing any act within the grant, and reasonably necessary to enjoy the easement granted, the company cannot be deemed a wrong-doer. It is perhaps true that the answer is not well drawn, and is censurable for its uncertainty, but the remedy for this defect is by motion, and not by demurrer.

TITLE OF APPELLANT.

The question as to the construction of the instrument executed by the appellant's grantor is also presented by the motion for a new trial, and it is argued that the instrument vests no estate in Toner and Leiter. We do not deem it necessary to repeat what we have said, but we may add, without repeating, that the instrument does vest in Toner and Leiter an interest in the land for railroad purposes, and that a valuable consideration is yielded for the estate granted, so that the trust is not a naked one. It is doubtless true that the grant was a conditional one, liable to be defeated by the failure to use the land for the purpose for which it was granted, but the appellant cannot defeat the grant by preventing

the building of the railaoad. It would be strange if a man could grant a strip of land for railroad purposes, and then defeat his own grant, by himself preventing the use of the land for the purpose for which it was conveyed by the one party and accepted by the other.

The appellant brought the action, averring that he owned the fee of the land upon which the alleged unlawful entry was made, and this fact he was bound to establish. Broker *v.* Scobey, 56 Ind. 588. The question is not whether the title is still in Leiter and Toner, but whether it is in the appellant; and it is not material whether Leiter and Toner have or have not made a formal conveyance of the land, or, indeed, any conveyance, whether by way of license or otherwise, for if the appellant is not the owner of the land it is utterly immaterial to him who does own it. If it were conceded that Leiter and Toner were bound to transfer the land to the railroad company, it would not avail the appellant; for, if the transfer was by parol, he could not successfully interpose the statute of frauds to break down their contract. He is not a party to the transaction between the railroad company and Leiter and Toner, and cannot, therefore, make the statute of frauds available to overthrow the transactions between them. Dixon *v.* Duke, 85 Ind. 434; Savage *v.* Lee, 101 Ind. 514; Bodkin *v.* Merit, 102 Ind. 293; s. c., 1 N. E. Rep. 625; Foltz *v.* Wert, 103 Ind. 404; s. c., 2 N. E. Rep. 950. The land had become Leiter and Toner's before he had any interest whatever in it, and he cannot defeat contracts, whether in writing or by parol, made by them for the purpose of carrying into effect the condition of the grant.

QUESTION STATED.

The clause in the contract reading thus, "And I do release and relinquish all claims for damages by reason of the location and construction of said railroad through or upon the above-described real estate," exerts an important influence upon this case, since it effectually cuts off all claim for damages arising from the construction of the railroad. When a property-owner executes a release expressed in such comprehensive terms as those employed in the instrument under immediate mention, he parts with all right to recover for injuries resulting from the careful and skilful construction of the railroad through his land. In such cases as this, one general release, or one assessment of damages, covers all damages that can arise from the proper construction of the railroad. City of North Vernon *v.* Voegler, 103 Ind. 314; s. c., 2 N. E. Rep. 821; Montmorency, etc., Co. *v.* Stockton, 43 Ind. 328; Lafayette, etc., Co. *v.* New Albany, etc., Co., 13 Ind. 90. The release executed by Myers protects the railroad company from liability for damages, as the appellant bought with notice of its execution. The effect of the release is to allow

RELEASE CONSTRUED.

the use of the land for the purpose of constructing a railroad, and this involves the right to do all incidental acts essential to the enjoyment of the principal thing granted.

Judgment affirmed.

Whether the Contract to Convey is a Lease, an Option to Purchase, or a Deed, may become a grave question in determining the rights of the parties. Such a question arose in New York, C. & St. L. R. Co. *v.* Randall, 8 West. Repr. 697, where the appellee granted to appellant a right to construct a railroad track, commonly called a "Y," over his real estate, and to occupy and use said track over said right of way for one year for the sum of $400, and it was provided that if before or at the expiration of said time the appellant determined to make permanent use of the track and should so inform appellee, it should have the authority to proceed to condemn the right of way, and apply said sum of $400 in part payment thereof, but if it elected to terminate the contract, it should be permitted to remove the track, rails, ties, and superstructure; and when, after the expiration of the year, the appellant continued to occupy and use said track for three months, and then with the consent of the appellee removed the same, it was *held* that the contract was a lease, and the appellant was liable for rent for another year as a tenant holding over, under the terms of the lease. It was also *held* in this case that the conveyance of an estate in land, subordinate to that of the grantor, to a grantee upon a valid consideration and for a definite term, constitutes the instrument of conveyance a lease.

Reservation of an Easement by the Deed of Conveyance.—The grantor of lands to a railway company or to a trustee for it may undoubtedly reserve an easement therein for his own, and ultimately for public, use. In Booraem *v.* North Hudson Co. R. Co., 5 Atl. Repr. 106, the grant contained this clause: "Together with all the right, title, and interest of said party of the first part to the lands covered by Ogden and Palisade avenues, in front of the land above described, subject to the easements of said avenues, respectively; it being understood that Ogden avenue is extended for the same width across said premises, and dedicated as a public highway." It was *held*, that this reserved an easement to the grantor in the strip over which Ogden avenue should be ultimately extended, and this notwithstanding the extension had not been made nor accepted by the public as a public highway, Depue, J., said: "The creation of a public right to be enjoyed *in futuro*, whenever the public authorities should see fit to adopt the extension of the avenue as a public highway, is not inconsistent with the private easement which inured to the grantee immediately from the grant. Indeed, whenever a dedication as a public highway is effected—as it usually is—by means of conveyances to private persons by reference to a proposed street over other lands of the grantor, the private rights of the several grantees precede the public right, and are the sources from which the public right springs. By such conveyances the grantees are regarded as purchasers by implied covenant of the right to the use of the street as a means of passage to and from their premises, as appurtenant to the premises granted, and this private right of way in the grantees is wholly distinct from and independent of the right of passage to be acquired by the public. There is some controversy whether the private right of way in grantees holding by such conveyances is merged in the public right when the dedication is consummated by public acceptance, or whether it is merely suspended thereby, and will revive if the public right be afterwards abandoned; but the authorities agree that, by such a description, the grantees acquire a right of way as an easement appurtenant to their lands, although the words of the grant indicate also a purpose to make the street a

public highway, so far as private individuals can make it such by a dedication; and it is upon the theory that the owner of the fee, by grants of rights of way in the street to his grantees, has parted with all beneficial ownership in the street, that the public authorities may take it for a public highway without any compensation to him. *In re* Seventeenth St., 1 Wend. 262; *In re* Lewis St., 2 Wend. 472; Livingston *v.* Mayor of New York, 8 Wend. 85; Taylor *v.* Hopper, 62 N. Y. 649; *In re* Eleventh Ave., 81 N. Y. 436, 446; Alden *v.* Murdock, 13 Mass. 256; Thomas *v.* Poole, 7 Gray, 83; Rodgers *v.* Parker, 9 Gray, 445; Fox *v.* Union Sugar Refinery, 109 Mass. 292; Attorney-general *v.* Morris & E. R. Co., 19 N. J. Eq. 386; 2 Smith Lead. Cas. (8th Ed.) 178. The principle on which the cases cited were decided is applicable to the case in hand; for a grantor may acquire an easement in lands conveyed, by apt words in the deed to create such a right, which, by way of estoppel, covenant, or implied grant, will bind the grantee, and the deed will operate as a grant of the fee, subject to the grantor's easement. God. Easem. 108; Cooper *v.* Louanstein, 37 N. J. Eq. 285; Stetson *v.* Dow, 16 Gray. 372."

Dedication to Public, Subject to Railway Use; Suspension of Public During Railway Use—Conveyance of Grantor's Interest in Highway.—A dedication of land for public use as a highway may be made subject to a right to designate a portion thereof for use for railroad purposes, and when such portion has been designated and devoted to railroad purposes, the public use will be suspended and remain suspended so long as that portion is devoted to such purposes. A conveyance of land along such a highway prior to the designation of a portion for railroad purposes will pass the grantor's title to the centre of the street, subject to the public easement and the reserved right to devote to use for railroad purposes. When he who has made such a dedication has conveyed a central strip of thirty-three feet to a railroad company for railroad purposes, a conveyance afterwards made of land along such a highway will pass all the title the grantor has under the street to its centre; the circumstance that the grantor does not own all the land to the centre will not restrict the conveyance to the line of the street. Ayers *v.* Pennsylvania R. Co., 5 East. Repr. 128.

Whether Title to One Half of Street Passes by Deed of Abutting Lot.—This became a question in Gould *v.* Eastern R. Co., 6 East. Repr. 116. In this case the description of the premises was as follows: "Northwesterly by a new street forty feet wide, called First street on a plan hereinafter mentioned, one hundred and fifty-four feet; northeasterly by Lynde street sixty-seven feet; southeasterly by a common passageway six feet wide, and there measuring one hundred and fifty-four feet; and southwesterly by another common passageway six feet wide, and there measuring sixty-seven feet. The above granted tract of land contains seven lots, numbered 16, 17, 18, 19, 20, 21, 22, on a plan made by Ebenezer Barker, called 'Charlestown Wharf Company, Section 1,' dated October 3, 1838, recorded with Middlesex Deeds. Also a certain other tract of land situate in said Charlestown, containing lots numbered 23 and 24 on said plan, bounded, described, and measuring as follows, viz: northeasterly by Lynde street sixty-seven feet; southeasterly by a new street forty feet wide called Second street on said plan, forty-four feet; southwesterly by lot numbered 25 on said plan, sixty-seven feet; and northwesterly by a common passageway six feet wide, forty-four feet. Also the right and privilege in common with said corporation, its successors and assigns, and all others having the like right, to pass and repass, in, through, and over each of said passageways, which right and privilege is appurtenant to each of the above granted lots." The question was raised whether this description conveyed the fee in said streets and passageways to the several grantees. It was *held* that it did. C. Allen, J.,

said: "Where there is a plan showing a tract of land laid out into streets and passageways, blocks and lots, the blocks and lots are usually defined by lines, which are coincident with the outer lines of the streets and passageways, and the dimensions and boundary lines of the blocks and lots are usually expressed in figures which exclude the streets and passageways. And when in a deed of a lot of land reference is made to such a plan, it is usual to give the dimensions of the lot as shown by the plan. But although, in such cases, the literal description in the conveyance does not in terms include the grantor's interest in the adjacent streets or passageways, yet the presumption is so strong that a grantor, under such circumstances, does not intend to retain the fee therein, subject to the right of way, after disposing of all his interest in the land, which is subject to exclusive occupancy, that it has come to be established as a rule of law, that the conveyance will by implication be held to include one half of such adjacent streets and passageways, if the grantor owns the same, unless there is something further to show a contrary intention. In Codman *v.* Evans, 1 Allen, 443, enough was found to show such contrary intention, and the passageway was held not to be included in the grant. In Motley *v.* Sargent, 119 Mass. 231, a case in some particulars much like Codman *v.* Evans, such evidence of such contrary intention was wanting, and the general rule was applied, that where there is a boundary upon a fixed monument which has width, as a way, stream, or wall, even if the measurement run only to the side of it, the title to the land conveyed passes to the line, which would be indicated by the middle of the monument. So in Clark *v.* Parker, 106 Mass. 554, it was *held* that 'the law presumes it to be the intention of the grantor to convey the fee of the land to the centre of the way, if his title extends so far. This presumption is of course controlled whenever there are words used in the description showing a different intention. But it has been held that giving measurement, in the deed, of side lines, which reach only to the outer line of the way, are not alone sufficient to overcome it.' And in Berridge *v.* Ward, 10 C. B. (N. S.) 400, a reference in a deed to a plan annexed, the measurement and coloring of which would exclude the highway, was *held* not to control the presumption of law that the soil of the highway to the centre thereof passes by the conveyance. See also Walker *v.* Boynton, 120 Mass. 349; White *v.* Godfrey, 97 Id. 472. The grant in such a deed of a right or privilege to use the passageway or street does not exclude the inference of a grant of one half thereof, because it is designed to show that the grantee shall have a right to use the whole width thereof. Motley *v.* Sargent, 119 Mass. 231; Peck *v.* Denniston, 121 Id. 17. Looking at the deeds in the present case, in the light of the foregoing decisions, it must be held that they conveyed the fee in the streets and passageways to the several grantees."

Conditional Conveyances of Right of Way.—Among the earlier cases dealing with this subject is Dayton, etc., R. Co. *v.* Lewton, 20 Ohio St. 401. In this case a conveyance of the right of way was made to a railway, upon condition that crossings and cattle-guards should be constructed. It was *held*, that the grantor held an equitable lien upon the land conveyed, not only for the purchase-money, but also for the damages in not constructing the road in the manner provided by the contract. The grantor in such a case can either enforce specific performance of the contract or enforce his specific lien. A conveyance to a railway company of land for the right of way of such road upon condition that the company should erect and maintain a certain dam or embankment, conveys the title to the land subject to be defeated by the failure of the company to comply with the condition, the condition being a condition subsequent. Underhill *v.* Saratoga and Wash. R. Co., 20 Barb. (N. Y.) 455. The defendant obtained from the plaintiff a

deed in fee of a strip of land for the extension of its road; and covenanted to make and maintain the fences, etc.; and the deed was to be void, unless the railroad was completed through the premises granted on or before a certain day therein named. The road was not completed at the time specified, but the plaintiff made no effort to assert his right to the estate. During a period of two years he saw the defendant make large expenditures over the premises in question; plaintiff gave notice to make the fences, which was done about a year before the suit commenced. *Held*, that the plaintiff had waived the forfeiture, and could not recover the premises in an action of ejectment. Ludlow *v.* N. Y. & Harlem R. Co., 12 Barb. (N. Y.) 440. When a conveyance of a right of way is made on condition that the depot of the company shall be located within a certain distance of a given place, a breach of this condition will defeat the title conveyed by the deed, and the grantor may have his damages assessed as if no deed had ever been made. And the estate conveyed being less than a freehold, no formal act of entry on his part is necessary in order to avail himself of the right to proceed in this manner. Taylor v. Cedar Rapids & St. Paul R. Co., 25 Ia. 371. A condition in the deed that certain portions of the land conveyed shall be kept open as public streets, is not void as imposing a duty or trust upon the corporation inconsistent with its business, and outside of the objects for which it was formed. Tinkham *v.* Erie R. Co., 53 Barb. (N. Y.) 393.

Performance of Condition Precedent Essential to Compel Conveyance.—A. entered into a contract with a railroad company to convey it to a right of way over his land when the road was located on the land, and the agreed price paid. *Held*, that the location of the road was a condition precedent; but when the company tendered the consideration, and was ready to perform its part of the agreement, the contract became binding, and a petition alleging such facts was sufficient in a suit to compel A. to carry out his part of the agreement. Wisconsin, etc., R. Co. *v.* Braham, 32 N. W. Repr. 392.

When a Condition Precedent is Performed, Conveyance may be Compelled.—A specific performance of a verbal contract to convey to a railroad company an acre of land upon condition that the company erect thereon its section house and a dwelling-house for its section foreman, where the company had entered thereon and performed the conditions precedent to its right to the conveyance, may been forced. Chicago, B. & Q. R. Co. *v.* Boyd, 4 W. Repr. 137.

This decision is in line with the prior case of Borders *v.* Murphy, 78 Ill. 81, wherein it is held that the building of a depot, etc., is a sufficient consideration for an agreement to convey land. Such agreement by the equitable owner, made subject to the approval of the holder of the legal title, if the latter permits the improvements to be made without objection, will be enforced in equity.

Right to Excavate on Right of Way Affirmed.—A railroad company, having acquired a right of way by condemnation proceedings, has a right to make excavations thereon for the purpose of obtaining dirt for surfacing its roadbed; and the company is not liable in damages to an adjacent property-owner by reason of the unsightliness of his plantation, or its supposed unhealthiness from standing water, or the inconvenience of crossing over caused by the pits made in such excavations. New Orleans, etc., R. Co. *v.* Brown, 1 South. Repr. 637.

A railroad company has practically the exclusive possession and control over the land within the lines of its location, and has the right to do anything upon such land which is necessary to the safe and proper management of the road. Hayden *v.* Skillings (Me.), *ante*.

Minneapolis and St. Louis Railway

v.

Columbus Rolling Mill.

(119 *United States*, 149.)

A reply to an offer of sale, purporting to accept it on terms varying from those offered, is a rejection of the offer and leaves it no longer open.

On December 8, A offered to sell to B 2000 to 5000 tons of iron rails on certain terms specified, adding that if the offer was accepted A would expect to be notified prior to December 20. On December 16, B replied, directing A to enter an order for 1200 tons, "as per your favor of the 8th." On December 18, A declined to fulfil B's order. *Held*, that the negotiation between the parties was closed, and that an acceptance by B on December 19 of the original offer did not bind A.

The submission of a question of law to jury is no ground of exception if they decide it aright.

Error to the circuit court of the United States for the southern district of Ohio. Argued November 12, 1886. Decided November 19, 1886.

This was an action by a railroad corporation established at Minneapolis in the State of Minnesota against a manufacturing corporation established at Columbus in the State of Ohio. The petition alleged that on December 19, 1879, the parties made a contract by which the plaintiff agreed to buy of the defendant, and the defendant sold to the plaintiff, 2000 tons of iron rails of the weight of 50 pounds per yard, at the price of $54 per ton gross, to be delivered free on board cars at the defendant's rolling mill in the month of March, 1880, and to be paid for by the plaintiff in cash when so delivered. The answer denied the making of the contract. It was admitted at the trial that the following letters and and telegrams were sent at their dates, and were received in due course, by the parties, through their agents:

December 5, 1879. Letter from plaintiff to defendant: "Please quote me prices for 500 to 3000 tons 50-lb. steel rails, and for 2000 to 5000 tons 50-lb. iron rails, March 1880 delivery."

December 8, 1879. Letter from defendant to plaintiff: "Your favor of the 5th inst. at hand. We do not make steel rails. For iron rails, we will sell 2000 to 5000 tons of 50 lb.

Eppa Hunton (*C. N. Olds* and *L. J. Critchfield* with him) for plaintiff in error.

Richard A. Harrison for defendant in error.

GRAY, J.—The rules of law which govern this case are well settled. As no contract is complete without the mutual assent of the parties, an offer to sell imposes no obligation until it is accepted according to its terms. So long as the offer has been neither accepted nor rejected, the negotiation remains open, and imposes no obligation upon either party; the one may decline to accept, or the other may withdraw his offer; and either rejection or withdrawal leaves the matter as if no offer had been made. A proposal to accept, or an acceptance, upon terms varying from those offered, is a rejection of the offer, and puts an end to the negotiation, unless the party who made the original offer renews it, or assents to the modification suggested. The other party, having once rejected the offer, cannot afterwards revive it by tendering an acceptance of it. Eliason *v.* Henshaw, 4 Wheat. 225; Carr *v.* Duval, 14 Pet. 77; National Bank *v.* Hall, 101 U. S. 43, 50; Hyde *v.* Wrench, 3 Beavan, 334; Fox *v.* Turner, 1 Bradwell, 153. If the offer does not limit the time for its acceptance, it must be accepted within a reasonable time. If it does, it may, at any time within the limit and so long as it remains open, be accepted or rejected by the party to whom, or be withdrawn by the party by whom, it was made. Boston & Maine R. *v.* Bartlett, 3 Cush. 224; Dickinson *v.* Dodds, 2 Ch. D. 463.

LAW AS TO ACCEPTANCE OF CONTRACT.

The defendant, by the letter of December 8, offered to sell to the plaintiff two thousand to five thousand tons of iron rails on certain terms specified, and added that if the offer was accepted the defendant would expect to be notified prior to December 20. This offer, while it remained open, without having been rejected by the plaintiff or revoked by the defendant, would authorize the plaintiff to take at his election any number of tons not less than two thousand nor more than five thousand, on the terms specified. The offer, while unrevoked, might be accepted or rejected by the plaintiff at any time before December 20. Instead of accepting the offer made, the plaintiff, on December 16, by telegram and letter, referring to the defendant's letter of December 8, directed the defendant to enter an order for twelve hundred tons on the same terms. The mention, in both telegram and letter, of the date and the terms of the defendant's original offer, shows that the plaintiff's order was not an independent proposal, but an answer to the defendant's offer, a qualified acceptance of that offer, varying the number of tons, and therefore in law a rejection of the offer. On December 18, the defendant by telegram declined to fulfil the plaintiff's order. The negotiation between the parties was thus closed, and the plaintiff could not afterwards fall back on the defendant's original offer. The plaintiff's attempt to do so, by the telegram of December 19, was therefore ineffectual and created no rights against the defendant.

EFFECT OF CORRESPONDENCE.

Such being the legal effect of what passed in writing between the parties, it is unnecessary to consider whether, upon a fair interpretation of the instructions of the court, the question whether the plaintiff's telegram and letter of December 16 constituted a rejection of the defendant's offer of December 8 was ruled in favor of the defendant as matter of law, or was submitted to the jury as a question of fact. The submission of a question of law to the jury is a ground of exception if they decide it aright. Pence *v.* Langdon, 99 U. S. 578.

Judgment affirmed.

The Manner of Acceptance must Comply with the Offer.—A proposition in writing to sell land at a certain price, if taken within thirty days, is a continuing offer, which may be retracted at any time; but if, not being retracted, it is accepted within the time, such offer and acceptance constitute a valid contract, the specific performance of which may be enforced by a bill in equity. Boston & Maine R. *v.* Bartlett, 3 Cush. 224. An offer to sell property may be withdrawn before acceptance without any formal notice to the person to whom the offer is made. It is sufficient if that person has actual knowledge that the person who made the offer has done some act inconsistent with the continuance of the offer, such as selling the property to a third person. The sale of the property to a third person would of itself amount to a withdrawal of the offer, even although the person to whom the offer was first made had no knowledge of the sale.

The owner of property signed a document which purported to be an agreement to sell at a price fixed. But a postscript was added which he also signed: "This offer to be left over until Friday 9 A.M." *Held*, that the document amounted only to an offer, which might be withdrawn at any time before acceptance, and that a sale to a third person which came to the knowledge of the person to whom the offer was made was an effectual withdrawal of the offer. Dickinson *v.* Dodd, 2 Ch. D. 463. The mode of acceptance must accord with the mode, if any, suggested in the offer. Thus where the answer was requested by a "return of wagon to Harper's Ferry," and instead was sent by mail to the residence of the proposer at Georgetown, it was held that there was no contract. Eliason *v.* Henshaw, 4 Wheat. 225. In this case Justice Washington said: "An acceptance communicated at a place different from that pointed out by the plaintiffs and forming a part of their proposal imposed no obligation binding upon them, unless they had acquiesced in it, which they declined doing. This was followed in Carr *v.* Duval, 14 Pet. 77, when an answer was desired by return mail, and an acceptance was held not to bind. On the same principle, when it is part of the offer that the contract shall be put in writing, it will not be valid until written and signed by all parties. Bourne *v.* Shapleigh, 9 Mo. App. 64; Maitland *v.* Wilcox, 17 Penn. 231. When a city council passed an ordinance first accepting a written proposal touching the erection of certain machine-shops, etc., and then providing the means for carrying out that acceptance, not merely or exclusively on the terms proposed, but "on such further conditions as may be deemed necessary," and further authorizing the mayor to enter into a written agreement relative to such proposition; *held*, that the contract was not complete and could not be enforced against the city until its terms were fully agreed upon and the contract closed by writing. An absolute acceptance of a proposal, coupled with any qualification or condition, will not be regarded as a complete contract, because there at

no time existed the requisite mutual assent to the same thing in the same sense. Eads v. City of Carondelet, 42 Mo. 113; Morrill v. Tehama & Co., 10 Nev. 125.

HITTE, Adm'r,

v.

REPUBLICAN VALLEY R. Co.

(*Advance Case, Nebraska.* May 26, 1886.)

When a railroad corporation enters into an agreement with a contractor to build a portion of its railroad, the locomotives, cars, etc., used in such construction, and run exclusively under the direction and control of the contractor until the road is completed and turned over to the corporation, the railroad company will not be liable for damages occasioned by the negligence of the persons running such locomotives and cars.

ERROR from Nemaha county.
Stevenson & Murfin for plaintiff.
Marquette & Dewese for defendant.

COBB, J.—This action was brought in the district court of Nemaha county, by the plaintiff in error against the defendant in error, for damages alleged to have accrued to the plaintiff in error, as administrator, for the negligence of the servants and employees of the defendant railroad company, by means of which the intestate of plaintiff in error was run over and killed by the cars of defendant. There was a trial to a jury, which, by direction of the court, found a verdict for the defendant.

FACTS.

There is but one question presented by the record in this case, to which it is deemed necessary to direct our attention, and that is whether, under the law, and the facts as shown by the evidence preserved in the bill of exceptions, the defendant was responsible for the manner of running and operating the train at the time and place of the accident. It appears from the testimony of plaintiff's witnesses that the railroad was being built; that the plaintiff's intestate was run over and killed, or rather, in the language of the witness C. C. Donald, "while they were laying the iron or surfacing." This witness, as well as others, speaks of the train by which Hitte was killed as a construction train. I assume it, then, to have been clearly proved by plaintiff's own witnesses, that the road was being constructed, and had not been finished or opened for business or traffic at the time of the injury. From the evidence of the de-

fendant it appears that part of its road, lying between Nemaha City and Tecumseh, was built by John Fitzgerald under contract with the defendant company; that the said road was unfinished, and being constructed, at the time of the said injury; that the engine and cars by which said injury was inflicted were in the care and custody of, and were being run, operated, and managed by, the servants and hired men of the said John Fitzgerald, and not of the defendant. The following clauses of the contract between defendant and the said John Fitzgerald are deemed material as showing the contractual relations between said company and said contractor, in reference to the responsible use of the engine and cars through which the injury in question occurred:

"This indenture and agreement made this first day of October, 1880, by and between the Republican Valley R. Co., party of the first part, and John Fitzgerald, party of the second part, witnesseth, that the party of the second part, in consideration of the covenants, promises, and agreements of and in behalf of the party of the first part, will and hereby does agree, covenant, and promise, to and with said party of the first part, to construct—that is, to grade, bridge, and lay track over—that part of the Republican Valley Railroad as now located, from a point on the Nebraska Railway at or near Nemaha, in Nemaha county, Nebraska, to a point in the northwest quarter of section 28, 15 N., R. 14; and, provided said party shall desire it, from the latter point, on a line hereafter to be decided upon, to a point on the Atchison & Nebraska Railway, at or near Tecumseh, a distance of 33 miles. . . . All work must be done in strict accordance with the specifications hereto attached, which specifications are a part of this contract, and under the directions and to the satisfaction of the engineer in charge of said railroad to be constructed, whose orders in all matters relating to this contract the second party agrees implicitly to obey. . . . The party of the first part agrees to furnish the neccessary cars. . . . The party of the first part agrees to attend to the usual and common repairs of engine and cars necessary during their usage by the party of the second part, but party of the second part will be held responsible for any damages or breakage done to said trains through neglect or disobedience of established rules, by itself, agents, or employees, or through defects in the road, while constructing the same. . . ."

The greater part of the brief of plaintiff in error is devoted to a discussion of alleged errors on the part of the court in refusing to instruct the jury upon the question of negligence, in its several respects and bearings, as applicable to the defendant, and of contributory negligence, as applicable to the plaintiff's decedent. I do not feel called upon to express any opinion as to whether there was any evidence of negligence in the running and management of

the construction train which caused the injury, as the case turns upon the question of responsibility of the defendant for the running and management of said train at the time of the injury.

The case of Hughes *v.* Railway Co., 39 Ohio St. 461, cited from 15 Am. & Eng. R. R. Cas. 100, was brought by Hughes against the railway company "for that, in constructing its railroad through her lands, the defendant had wrongfully piled large quantities of waste dirt upon her arable lands, not embraced within the right of way, to her damage," etc. An issue of fact having been joined, a jury was impanelled, and the plaintiff offered testimony. After the plaintiff closed her testimony, the court, on motion of defendant directed the jury to return a verdict for defendant, which was done accordingly. The judgment on this verdict was affirmed in the supreme court. It appears from the report of the case that the work of building this road was done by contractors, under a contract with the railroad company, containing provisions substantially the same as those herein quoted from the contract between the defendant company and the contractor Fitzgerald. In the opinion the court say: "The work of constructing a railroad is not corporate work, unless it be done by a corporation through its agents and servants; and a person may contract with a railroad company to construct its road, without becoming its agent or servant. This proposition, therefore, resolves itself into a single question: May a railroad corporation, having power to contract as fully as a natural person in relation to its corporate business, enter into a contract with another person for the construction of its road, without retaining control over the mode and manner of doing the work? We can see no reason to doubt it. Of course, any condition imposed upon the right to construct its road must be performed, and the company cannot shift its responsibility for the performance. But this is no new principle, nor one applicable to railroad corporations alone. Where a right is possessed by a natural person, and a duty is attached to the exercise of the right, such duty must be performed. Such natural person cannot relieve himself from liability through the intervention of an independent contractor. On the other hand, where the law exempts a natural person, as employee, from liability for the wrongful act of his contractor, it will also exempt a corporation, as employer, from liability for the wrongful act of its contractor." To the same purport are the cases of Hunt *v.* Pennsylvania R. Co., 51 Pa. St. 475, and McCafferty *v.* Spuyten Duyvil R. Co., 61 N. Y. 178, cases cited by counsel for defendant.

POWER OF RAILWAY COMPANY TO EMPLOY INDEPENDENT CONTRACTOR — LIABILITY.

In the case at bar, Fitzgerald was clearly an independant contractor. He had the use of the engine and cars of the defendant as a part of the consideration for the work performed by him;

and if the engineer and firemen of the train which did the damage were borne upon the pay-rolls of the defendant while working on the contract, as claimed by counsel for plaintiff, which does not fully appear from the evidence, doubtless their compensation was fully accounted for by the contractor to the company. I conclude, therefore, that the train, consisting of an engine, tender, and one or two flat cars, which struck and killed plaintiff's decedent, was not being run by, nor under the control or management of, the defendant company; and that the defendant is not bound to respond to any damage, if any, suffered through or by reason of the negligence of the engineer, conductor, or other persons in charge of the said train.

The plaintiff contends that the court erred in admitting the contract between defendant and Fitzgerald to be read in evidence — First, because said contract was not proven; and secondly, because it was immaterial, irrelevant, and incompetent.

As to the first ground of objection, it will be seen by reference to the bill of exceptions than the execution of the contract by Fitzgerald on his part was fully proven by the testimony of the witness Deweese; and the defendant, having acted under the contract, and claimed the benefit of its provisions, would be estopped to deny any of its obligations; and even as against a stranger I think it may introduce the contract as the best evidence of the terms and relations which, at the time of the occurrence upon which the action was based, existed between defendant and contractor.

As to the second ground, we have seen that the contract or contractual relation between the defendant and the contractor was not only material and relevant, but that, even admitting for the sake of the argument that the plaintiff's decedent was killed through the negligent management of the train in question, in our opinion the question of the liability of the defendant therefor would turn upon the fact of said work being done by the defendant through its servants and employees, or by an independent contractor. The contract upon which the road was built and paid for, then, was neither immaterial nor irrelevant.

The judgment of the district court is affirmed.

Liability of Company for Acts of Contractors and their Servants.—A railroad corporation was authorized to construct its railway, and in the progress of the work it became necessary from time to time to remove certain barriers, which were placed by the corporation across the highway for the protection of travellers, but were adopted by the town in which the highway was situated, and in consequence of the neglect of the workmen to replace the barriers at night, a traveller sustained injury. *Held*, that the corporation was responsible for the negligence of such workmen, although they were employed by an individual who had contracted to construct this portion of

the railroad for a stipulated sum, the work being done by direction of the corporation. Lowell v. Boston & L. R. Co. 23 Pick. 24; Carter v. Berlin Mills Co., 58 N. H. 52; Wright v. Holbrook 52 N. H. 120; Forsyth v. Harper, 11 Allen (Mass.), 419; Hillard v. Richardson, 3 Gray (Mass.), 349; Linton v. Smith, 8 Id. 147; Vt. Cent. R. Co. v. Baxter, 22 Vt. 366; Blake v. Ferris, 5 N. Y. 48.

If a man employed by a contractor who was engaged in repairing a bridge receives an injury from a passing train while at work upon the bridge, he may maintain an action for damages against the railroad company; provided he can show that the injury was caused by the negligence of the company's servants or agents in charge of the train, without any fault or negligence on his part. Young v. R. Co., 30 Barb. 229; Barrett v. Singer Mfg. Co., 1 Sweeney (N. Y.), 545; Pack v. Mayor, 8 N. Y. 222; Storrs v. Utica, 17 N. Y. 104.

A railroad company is not liable for damages resulting from the negligent management of one of its trains used and controlled by construction contractors for construction purposes, on a portion of its road built under construction contract and not yet turned over to the railroad company. Cunningham v. The International R. Co., 51 Texas, 503; West v. St. Louis, etc., R. Co., 63 Ill. 545; Guardier v. Carmack, 2 E. D. S. (N. Y. C. P.) 254; Salter v. Mersereau, 64 N. Y. 138; Camp. v. Church Warden, 7 La. An. 321.

A railroad corporation engaged a contractor to construct, "under the general supervision of the chief engineer of the company," a specific portion of its railroad, located across the plaintiff's timber tract; and the sub-contractor and his employer cut a tote road through the plaintiff's premises, outside of the location, and set fires which through their negligence spread and burnt the plaintiff's timber. *Held*, that the company not having directed the acts complained of, and having no such control over the persons who committed them as to direct or remove them, was not liable for the damages occasioned thereby. Eaton v. European & N. Am. R. Co., 59 Me. 520. When a railroad is being constructed, and is in the exclusive possession of and operated by a contractor for its construction, and the railroad company at the time of the injuries complained of are committed has no control thereof, such company is not liable for the damages resulting from the operation of such railroad. Kansas Cent. R. Co. v. Fitzsimmons, 18 Kan, 34; Painter v. Pittsburg, 46 Pa. St. 213; Carman v. Steubenville, etc., R. Co., 4 Ohio St. 399; Morgan v. Bowman, 22 Mo. 538; Barry v. St. Louis, 17 Id. 121; Hillard v. Richardson, 3 Gray (Mass), 349; Hunt v. Penn. R. Co., 51 Pa. St. 475; Schnear v. Hudson River R. Co., 30 Barb. (N. Y.) 653; Burke v. Norwich, etc., R. Co., 34 Conn. 474; Murray v. Currie L. R. 6 C. P. 24; Weynant v. New York, etc., R. Co., 3 Duer (N. Y.), 360.

After the contract has been properly completed and the works handed over to the commissioners or persons who have employed the contractor, the liability of the contractor ceases, and for any subsequent injury cause by the natural result of the work the contractor has completed, the commissioners and not the contractor will be responsible; as where the defendant under a contract with the Metropolitan Board of Works opened a highway for the purpose of constructing a sewer thereunder, and after finishing the sewer, properly filled in and made good the road, which, however, subsequently subsided, which is the natural result of such opening the road and loosening the materials of which it is composed, and the plaintiff's horse stumbled into one of the holes so caused and was injured. Hyams v. Webster, L. R. 2. Q. B. 262; Bartlet v. Barker 34 Law J. Exch. 8. Where work which can lawfully be done without injury to others is placed in the hands of a builder or contractor, who selects his own workmen and servants for the performance of the work, and directs the manner of doing it, exercising his own judgment in the matter and having the immediate control over the workmen, such contractor, and not the

persons who employs him, is the person responsible for injuries to strangers from the negligent execution of the work. Steel *v.* S. E. R. Co., 16 C. B. 550.

Negligence of Contractors.—See Edmundson *v.* Pittsburg, McK. & Y. R. Co., 23 Am. & Eng. R. R. Cas. 423.

STATE *ex rel.* THE CITY OF KANSAS
v.
CORRIGAN CONSOLIDATED STREET R. Co.

(85 *Missouri*, 263.)

The usual powers conferred by its charter on a municipal corporation over its streets are sufficient to authorize it to permit their use for horse railways; *aliter* as to railways operated by steam.

An ordinance of a city giving the privilege of using its street for a horse railway, and which contained a provision requiring the railway company to keep and maintain the space between its rails and for two feet on either side of its track, and all street crossings along its line in good repair, does not impose on such company an obligation to re-construct the street.

An obligation to repair a street is not an obligation to construct thereon a new pavement.

Nor could the city, by a subsequent ordinance, impose on the railway company, without its consent, such additional obligation to pave the street. Such subsequent ordinance cannot be sustained on the ground that it is a proper exercise of the police power of the city.

Nor is an ordinance of the city requiring a horse railway to repair the street between the rails and on the sides of such railway, invalid as being a surrender by the city of its corporate power over its streets.

APPEAL from Jackson circuit court.

Reversed.

John C. Tarsney for appellant.

Wash Adams, *John J. Campbell*, and *R. H. Field* for respondent.

George W. McCrary also for respondent.

NORTON, J.—This is a proceeding by *mndamus* begun in the circuit court of Jackson county to compel the defendants to pave so much of Union avenue (a street in the city of Kansas), as lies between the rails of a horse railroad operated on said avenue and owned by defendant company, and also eight inches on the outside of said rails along said track, in the same manner and with like material, at the same time and as fast as the balance of said street may be paved to completion. A return was made to FACTS.

the alternative writ and a trial had upon the issues presented, which resulted in a judgment of the court awarding a peremptory writ, from which the defendant has appealed to this court.

It appears from the record that the Jackson County Horse R. Co. on March 27, 1869, was duly incorporated under the laws of this State as a private corporation for the purpose of constructing and operating a horse railroad over the streets of the City of Kansas; that on said day the City of Kansas granted by ordinance to the said Jackson County Horse R. Co. the right to construct, maintain, and operate a horse railroad on various streets in said city, of which Union avenue is one, for the period of twenty years. Sections four and twelve of said ordinance are as follows: "Section four. The space between the rails of said track and the street for a space of two feet on either side and along the line of said track, and also all street crossings along the line of said street railroad, shall be kept and maintained in good repair by said railroad company, and passing, crossing, or travelling upon or along the streets and avenues upon or along which such street railroad may pass shall in no wise be obstructed by said railroad company." By section twelve of said ordinance it was provided as follows: "Section twelve.—That said horse railroad company shall be governed in all respects by the ordinances of the City of Kansas regulating horse railroads, or in any wise appertaining to such roads." That no other provisions of said ordinance had any relation to the construction or repair of streets or imposed any duty or obligation upon said company regarding the construction or repair of streets, or any pavement thereupon. That at the date of the enactment of said ordinance and acceptance thereof by said company, there was no general ordinance of the City of Kansas regulating horse railroads or in any wise appertaining to such roads. That by section two of chapter thirty-eight of an ordinance of the City of Kansas entitled, "An ordinance in revision of the ordinances governing the City of Kansas," approved April 19, 1880, said chapter thirty-eight relating to horse railroads, it was provided as follows:

"It further appears that the said Jackson County Horse R. Co., in pursuance of the right granted by said ordinance, constructed and put in operation in 1870 and 1871 several miles of street rail over the streets on which it had obtained the right to operate such road, including that part of Union avenue described in the petition; that said company and defendant company, which, in 1874, by purchase, succeeded to all the rights and privileges of the Jackson County Horse R. Co., had operated its said street railroad on said avenue from 1870 and 1871."

It further appears that said Union avenue, on which said railroad was operated, was, on the 27th day of March, 1869, and at all times thereafter, until May, 1884, had been kept as an un-

paved dirt or macadamized street, at which time the city contracted with one Hackett for paving said street exclusive of the space between the rails of said street railway, and a space of eighteen inches on the outside of said rails. Said contract provided for paving said street with Colorado sandstone blocks, to be laid upon a foundation of concrete nine inches thick; that the same was to be an entirely new pavement, and as a preparation for laying the same the entire macadam and dirt surface was to be graded and removed. It further appears that the defendant, and Thomas Corrigan, as the president of the company, were notified and requested by the city engineer on behalf of the city, immediately after said work was begun by the city, to proceed to lay down and construct a pavement between the rails of said railroad track on said avenue, and for a space of eighteen inches on the outside of the rails, with the same kind of materials, upon the same kind of foundation and at the same time, and as the paving of the street progressed; that defendant refuesd to comply with the request, but proceeded to lay down a pavement between the rails of said track, composed of stone blocks taken from a quarry at Argentine, Kansas, which were of the same dimensions of the Colorado sandstone blocks being used by the said Hackett; that at the commencement of these proceedings the said paving between the rails was being done by the defendant more rapidly than the remainder of the street was being done by the contractor of the city; that the said pavement so laid by defendant in no way interfered with public travel and presented as smooth and regular a surface as that laid by the city.

Upon the refusal of defendant to comply with the above request of the city engineer, this proceeding was instituted to compel defendant to pave said street between its rails, and for a space of eighteen inches outside of them, with the same kind of material and in the same manner the street was being paved by said Hackett under his contract with the city. The city bases its title to the relief it seeks in this proceeding mainly on the following ordinances, the first one of which was adopted on June 29, 1880, and the second on May 24, 1884. They are as follows:

"Section 1. No person, company, or corporation, nor any person as president, superintendent, or other officer or agent of any street or horse railroad company or corporation shall keep, use, or maintain any street or horse railroad track, or part of a track, upon any street, or part of a street, in the City of Kansas, which said street, or part of said street, is now or may hereafter be paved with blocks of wood, stone, granite, or other material, unless the space between the rails of such track, and also the space adjoining and on the outside of such rails for the distance of eighteen inches in width, shall be paved with like blocks of stone, wood, granite, or

other materials in the same manner and for the same distance lengthwise that the balance of said street or part thereof may be paved.

"Sect. 2. No person, company, or corporation, nor any person as president, superintendent, or any other officer or agent, of any horse railway company or corporation shall run, operate, or maintain any street or horse railway in the City of Kansas, unless the space between and on the outside of the track thereof be paved as required by the preceding section."

"Sect. 5. Any person, company, or corporation, or any president, superintendent, or other officer or agent of any street or horse railway company or corporation violating any provision of section one (1), two (2), or four (4), of this ordinance shall be deemed guilty of a misdemeanor, and upon conviction thereof before the city recorder shall be fined not less than one hundred nor more than five hundred dollars."

The ordinance of May 29, 1884, is as follows:

"Section 1. It shall be the duty of every individual, company, or corporation owning or operating any horse or street railroads now constructed, or that may hereafter be constructed within the limits of the City of Kansas, to pave the space between the rails of such railroad, and eighteen inches on the outside thereof, immediately adjoining the outside rails, as the roadway beyond such limits may be paved. If the roadway be paved with stone, or wood, or other materials, such space between the rails and eighteen inches outside shall be paved with stone, or wood, or like material of the same quality, equally as good and in a similar manner, and upon the same specifications as the balance of the roadway shall be paved."

"Sect. 3. This ordinance is declaratory of the duties prescribed in an ordinance entitled, 'An ordinance to regulate street railways, and requiring them to pave their tracks and keep the same in repair,' approved June 29, 1880, and is not intended to repeal or supersede any part of said ordinance."

"Sect. 4. Such paving between such rails and eighteen inches outside thereof shall be done at the same time that the balance of the street is paved, and as fast as such paving progresses to completion. In case any railroad track shall be constructed or reconstructed on, along, or across any street already paved, it shall be the duty of the person, company, or corporation owning or operating such road to pave the track and eighteen inches outside thereof, as required by this ordinance, as fast as such track shall be laid, constructed, or reconstructed, so as to have such space paved immediately upon the completion of such laying, construction, or reconstruction."

It is argued on the part of the defendant that neither under the

charter of Kansas City, nor under the ordinance of March 27, 1869, by virtue of which it constructed and operated its road, did it assume an obligation to pave any portion of said street in any manner, but that the only obligation it did assume was to keep and maintain in good repair the space between its rails and two feet thereof on the sides and along the track of its road, and all street crossings along the line of said track, and that the said ordinances of June 20, 1880, and May 24, 1884, are void as to defendant, because they are violative of the agreement made between it and the city by the ordinance of March 27, 1869, in that it sought by them to impose a new and additional burden on defendant, namely, the reconstruction of Union avenue by putting down a new pavement, when, under its contract with the city, it is only chargeable with the obligation to repair. On the other hand, it is contended by counsel that the said ordinance, relied upon by defendant, afforded it no protection in the present proceeding, because the charter of the City of Kansas at the time of its adoption contained no provision expressly authorizing it to grant rights to street railways, or authorizing it to make contracts for the construction and operation of street railroads in the streets of said city; that under its charter the city only had the right to license or permit the laying of tracks in the streets in short lines and subject to revocation at the pleasure of the city; that the city, under its charter, did not have the right to enter into a contract with a corporation or other person authorizing the construction of a street railroad and its operation for a specified and limited time. The charter of Kansas City at the time the ordinance relied on by defendant was adopted, while it expressly gave to the city the power to open, grade, improve, and curtail its streets, did not give it in express terms the right to authorize a street railroad to be constructed and operated on them, and because this power was not thus conferred, it is insisted that the ordinance of March 27, 1869, either is a license or contract.

OBLIGATION TO PAVE.

As to the power of a municipal corporation to grant the use of its streets for railways, a marked distinction is taken by the authorities between railways operated by steam and those operated by horses and mules. After an examination by Mr. Dillon of all the reported cases upon the subject of railways in streets, including the case of Davis *v.* Mayor of New York, 14 N. Y. 506, and other cases cited by counsel for plaintiff, he states in section 727 of his work on Corporations, as the conclusion and result of such investigation, the following:

POWER OF MUNICIPALITY TO GRANT USE OF STREET FOR RAILWAY.

"As respects ordinary railways operated by steam, and street railways operated by horses, legislative authority is necessary to warrant them to be placed in streets or highways. The legislature

may delegate to municipal or local bodies the right to grant or refuse such authority. The usual powers of a general nature in municipal corporations over streets are not sufficient to confer upon them the right to authorize the appropriation of streets by ordinary railroads, whose tracks are constructed in the usual manner, and whose trains are propelled by steam, but it is otherwise as respects horse railways, and the ordinary powers of municipal corporations are usually ample enough, in the absence of express legislation on the subject, to authorize them to permit, or refuse to permit, the use of streets within their limits for such purposes. But they cannot by an implied power confer corporate franchises or authorize the taking of tolls. This must come from the legislature."

The reason for this distinction may be found in what is so well stated in the cases of Hinchman *et al. v.* Paterson Horse R. Co. 2 C. E. Green (N. J.) 75, and Jersey City & Bergen R. Co. *v.* Hoboken R. Co. 20 N. J. Eq. 69, in the last of which it is said, "that the operation of a horse railroad is a legitimate use of the highway and an exercise of the public right of travel. In general, the cars carry persons from any one point on their line to any other point to which they may desire to go. The courts must notice the fact that these street railways have become an important and valuable institution in all our cities and towns, especially valuable to persons of small or moderate means, and their chief value to the many consists in their being in the public streets. If placed in the rear or any distance from the streets their value would be small. They are but a means of using the public streets to a greater advantage for the very purpose for which they were laid out, free and quick transit from one point to another, they are the best and cheapest mode yet devised, and they do not hinder the use of the rest of the street for public travel, and hardly in a very small degree obstruct the travel on the part occupied by the tracks, except the few inches covered by the iron rails. The cars exclude other vehicles from the space occupied by them when in motion; so do omnibuses and drays. They have when in motion the right of way upon their own track, both as against those whom they meet and those who go in the same direction; a little more extended than the exclusive right of others which have only the exclusive right to one side of the road as against those whom they meet, but it is in principle the same."

If, as stated by Mr. Dillon in the section above quoted, and if, as held in the case of the Atchison Street Railway *v.* Missouri Pacific R. Co. 31 Kansas, 660, and Brown *v.* Duplessis, 14 La. Ann. 842, the right of control granted to a municipal corporation over its streets carries with it the power to allow such

corporation to grant a permit to a horse railroad company to construct and operate its road over its streets, the road ordinance of March 29, 1869, must be held valid. The only condition or burden annexed to the privilege given by the ordinance to defendant, to construct and operate its road, was that it should keep and maintain the space between its rails and a space of two feet on either side the line of its track, and all street crossings along its line, in good repair. The obligation to repair a street is one thing, and the obligation to reconstruct a street is another and different thing. To repair a thing is to restore it to a sound state after decay, injury, dilapidation, or partial destruction. To reconstruct is to construct or build again. One who only assumes an obligation to repair a house could not be required to tear it down and rebuild it. Without torturing the language of section 4 of the ordinance of 1869, and turning it away from its ordinary meaning, we cannot construe it so as to impose on defendant an obligation to reconstruct a street when in express terms it says the street shall be maintained and kept in good repair. The following authorities hold that an obligation to repair a street is not an obligation to construct thereon a new pavement: Chicago *v.* Sheldon, 9 Wall. 50; District of Columbia *v.* Washington R. Co., 4 Am. & Eng. R. R. Co. 174, the principle announced in the case of Chicago *v.* Sheldon, is approved.

So in the case of Farrar *v.* City of St. Louis, 80 Mo. 379, where the charter of the city of St. Louis provided that the cost of repaving all streets should be paid out of the general fund of the city, and when the city council had passed an ordinance requiring the pavement on Washington avenue to be taken up and the same to be repaved with granite laid down on the concrete foundation, and providing that the cost of such repairing should be assessed against and paid by the persons owning property fronting on the avenue, according to the frontage, some of the property-owners resisted the payment of the cost of repaving on various grounds, one of them being that the repaving of the avenue was nothing more than simply repairing it, and that the city, by virtue of its charter provision, was bound to pay the cost of the work out of the general or common fund, and that it was not chargeable against the persons owning property abutting on the avenue. The court held that the property-owners, and not the city, were liable for the cost of the whole, putting its decision on the ground that the reconstruction of the street and laying down upon it a new and different pavement was not repairing it.

It has been argued, however, by counsel, that, conceding the defendant was not bound by the ordinance of 1869 to pave, but only to maintain and keep it in good repair, as therein provided, the obligation to do so was imposed by the ordinance of 1884.

We are authorized to assume that at the time the ordinance of 1869 was adopted, the representatives of the city had in their minds, first, the propriety and expediency of granting the right to the company of operating its railroad on the streets of the city, and the length of time the right to do so should exist; and second, the terms and conditions which should be annexed to the grant. The only condition imposed, in so far as the ordinance relates to the streets on which the railroad was to be operated, was that the company should maintain and keep certain parts of them in good repair. The company had the right to conclude, in accepting the grant with only the above condition annexed, that in so doing it could not be charged with any other obligation than that of repairing so much of the streets as the ordinance specified. The ordinance, when accepted, was the contract of the parties, and fixed their respective rights and obligations. The said ordinance of 1884 undertakes to change this contract without the consent of the other contracting party by the imposition of a new and different obligation. This cannot be done unless we ignore the principle that it takes two to make a contract, and two to alter or change it when made As a consideration for the grant, the company bound itself to keep in repair certain parts of the streets, and to that extent agreed to relieve the city from the payment of costs for such repairs. If, after acceptance by the company of the grant with the said condition annexed, and the construction of its road at great cost, the city could, as it undertook to do in the ordinance of 1884, impose the new and additional obligation of paving a certain part of the street, why might it not require it to pave at its own cost the entire street, and keep it in repair when thus paved?

OBLIGATION OF ORDINANCE OF 1884.

It is further contended that even if the city council had the power to contract for the construction and operation of street railroads, in exercising such power it could not alienate the control of the street and of street improvements vested in the council by the charter. We recognize, in all its broadness, the doctrine laid down in section 97, Dillon on Corporations, where it is said: "Powers are conferred upon municipal corporations for public purposes, and as their legislative powers, as we have just seen, cannot be delegated, so they cannot be bartered or bargained away. Such corporations may make authorized contracts, but they have no power as a party to make contracts or frame by-laws which shall cede away, control, or embarrass their legislative governmental power, or which shall disable them from performing their public duties." While we recognize the soundness of the principle invoked, we cannot see that it has any application to the ordinance in question. If by the ordinance of 1869 the council had delegated to the company its control over the

ALIENATION OF CONTROL OF STREETS.

streets, or disabled themselves from taking up the macadam and dirt surface of the Union avenue or any other street, and reconstructing it with a different pavement, we would have no hesitancy in declaring it to that extent void. But such is not the effect of the ordinance, and it is not susceptible of being construed so as to deny to the city council the right at any time to improve the streets on which defendant is operating its railroad, or any of them, by macadamizing them, or laying down thereon stone or granite pavement, and charging the cost thereof against the property adjacent or abutting on the streets thus improved, as it is provided in the charter. There is nothing in the ordinance forbidding, either expressly or by implication, the exercise of such control by the council over its streets, but on the contrary, when such power is exercised and the street improved, the obligation of the defendant to maintain and keep it in repair between the rails of the company's track and the space of two feet on the outside thereon would at once attach. Nor is the power of the council to provide the manner of repairing the street, and requiring the defendant to repair it, in any way prescribed, interfered with, or delegated by the ordinance. It only provides that such repairs shall be made by defendant at its own cost, and to the extent that the city is thus relieved from the payment of such costs, it is beneficial to the public.

It is also insisted that the ordinance of 1884 can be maintained, on the ground that it is a proper exercise of the police power of the city, and that such power cannot be bargained away. Police power, if capable of a definition, is defined as follows, by Mr. Cooley, in his work in Constitutional Limitations, in chapter 16: "The police power of a State, in its comprehensive sense, embraces its whole system of internal regulation by which the State seeks not only to preserve the public order and prevent offences against the State, but also to establish for the intercourse of citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights of others." We cannot perceive how it can be claimed that the said ordinance of 1884, which, it is said, imposes upon defendant the duty of paving a part of the streets on which it operates its railroad, under a grant from the city, obliging it to repair and not to repave, is embraced within the police power of the city as above defined, especially so in view of the fact that the city had full power conferred on the council by its charter to do the very thing it seeks to require defendant to do by virtue of said ordinance. The city could not, under the pretence of exercising its police power, shift the duty delegated to it by its charter of

ORDINANCE AS AN EXERCISE OF POLICE POWER CONSIDERED.

paving the streets, if public good required it to be done, and charging the cost to adjacent property-owners, from its shoulders onto the defendant. Had the ordinance of 1869 provided that the city would not undertake to make regulations as to the operation of defendant's railroad as to the speed at which its cars should be run, the length of time they should stop at its terminal points, the number of hours on the day they should be run, etc., the principle invoked by the counsel, that the police power of the city could not be bartered away, would apply. Instead of doing this, however, the city, by section 12 of the ordinance, expressly provided that said horse railroad company shall be governed in all respects by the ordinances of the City of Kansas regulating horse railroads, or in any wise pertaining to such roads. We cannot give the above section of the ordinance the constructions claimed for it by the counsel, and so construe it as to make it nullify section 4 of the ordinance; to do so would be violation of a well-established and universal canon of construction, viz, that the provision of all laws, ordinances, and contracts should, if practicable, be construed so that all of them may stand and be made operative. We think it entirely practicable so to construe said section 12 as not to bring it in conflict with section 4, by holding it to refer to such regulations as are provided in section 2, chapter 38, of the ordinance of the City of Kansas, heretofore referred to, and which provides that "on all regulat routes the car shall be regularly run for the period of not less than sixteen hours, or longer, if the common council by resolution so order, during each and every day of the entire year, and shall not be allowed to stand longer than fifteen minutes at either terminus of the road. Cars on such regular lines shall be run at intervals not exceeding five minutes." Such obligations as the above are a proper exercise of the police power, but to extend it so as to make it include said ordinance of 1884, which imposes a duty on defendant which, by the charter, is imposed on the city council, would be stretching it beyond the limits prescribed by the authorities.

We cannot give our assent to the doctrine contended for, that by virtue of the ordinance of 1869 defendant obtained simply a license to expend large sums of money in constructing its railway, and at a time when the success of such a scheme was experimental, equipping it at great cost, assuming an obligation to keep in repair a certain part of the street, which license was and is revocable at the pleasure of the city. If, as we think, the authorities herein cited establish the proposition that the general power of control given the city in its charter over the streets carries with it a street railroad operated by horses or mules, to be constructed and operated on and over its streets, when the city exercises the power as it did in the passage of the ordi

ORDINANCE AS A LICENSE.

nance of 1869, and granted, permitted, or licensed defendant to build and operate its railroads, and defendant accepted the grant, expended large sums of money on the faith of it, and was permitted by the city to do so, the license referred to was a contract, the terms of which are binding on both parties to it. If any one thing is guarded in the law more particularly than another, it is the inviolability of a contract, and all attempts to impair such obligations, under whatever guise they are made, whether directly or indirectly, must prove abortive. State *ex rel. v.* Miller, 66 Mo. 329; State *v.* Miller, 50 Mo. 129; Hovelman *v.* K. C. Horse R. Co., 79 Mo. 632.

In determining this case we have not taken into consideration the amendment to the charter of the city made in 1870, holding as we do that any rights of defendant acquired under the charter as it existed previous to and at the time the ordinance of 1869 was adopted were unaffected thereby. City of St. Louis *v.* Mo. R. Co., 13 Mo. App. 524. For the reasons herein given, the judgment of the circuit court awarding a peremptory writ of mandamus is hereby reversed, with the concurrence of all the judges except Judge Black, who, having heretofore been of counsel, did not sit.

Street Railway—Rights and Duties.—See Fitts *v.* Cream City R. Co., 15 Am. & Eng. R. R. Cas. 462; Randall *v.* Jacksonville St. R. Co., 17 Ib. 184.

City of Waterloo

v.

Waterloo Street R. Co.

(Advance Case, Iowa. March 9, 1887.)

Where a city has granted to a corporation the privilege to construct and maintain a street railway in the streets and alleys of the city, the grant providing that the track of the railway shall be made to conform to the established grade of the streets, but containing no provisions as to the rail which shall be used on the track, or the gauge upon which it shall be constructed, the city, under its ordinary powers, has power to regulate the manner in which the track shall be constructed, and equity will not interfere to restrain the street railway corporation, at the suit of the city, from constructing its line with a rail and gauge obnoxious to the city authorities.

Appeal from district court, Black Hawk county.

This is an action in equity to restrain the defendents from laying down a street railway track in one of the streets of the plaintiff

city. Defendant appealed from an order overruling a motion to vacate a temporary injunction.

L. W. Reynolds and *Platt & Hoff* for appellant.

C. W. Muleen for appellee.

REED, J.—The city council of plaintiff passed an ordinance granting to defendant the exclusive privilege of constructing in the streets and alleys the necessary tracks for a street railway. The privilege granted extended to all the streets and alleys of the city, and was to continued for 30 years. Defendant accepted the grant, and proceeded to construct and operate its railway in a number of streets. It afterwards commenced the work of constructing a track in Jefferson street, when the council passed an ordinance which, by its terms, repealed the former grant, but granted the same privilege as to the streets then occupied by defendant. FACTS. The city thereupon commenced this action, alleging in its petition that, in constructing its track in Jefferson street, the defendant was acting without authority or right. The petition was presented to the judge of the district court, who, without any notice of the hearing having been served on defendant, granted a temporary writ of injunction, restraining defendant from prosecuting the work on that street. After this writ was served, defendant appeared, and filed an answer setting up the grant under which it claimed to be acting, and denying that it was acting without authority. Plaintiff thereupon filed an amendment to its petition, in which it alleged that defendant was using in the construction of the track what is known as the "T" rail, which was a different rail from that ordinarily used in street railways; also that it was constructing the track on an unusual gauge, and that, if it was permitted to construct the traek with that rail, and on that gauge, it would constitute a nuisance, and would greatly obstruct and interfere with the use of the street for ordinary purposes. Defendant answered this amendment, admitting that it was using the "T" rail, but but denying that said rail was not ordinarily used in street railways, or that the gauge on which it was constructing its track was an unusual gauge, or that the track would constitute a nuisance. It also moved to vacate the injunction on the grounds, among others, that the order granting the writ was made without notice to it, and that, the material allegations of the petition being denied, the writ ought not to be continued. The present appeal is from the order overruling that motion.

The grounds upon which the motion was denied were set out in the decision. The court held that, as the grant had been accepted by defendant, and partially performed, it constituted a contract between the parties, the terms of which could not be impaired or

changed by the subsequent action of either of them. It held, further, that the question whether the track, as defendant proposed to construct it, would constitute a nuisance, could only be determined upon a full hearing of the evidence, and that the injunction should be continued until such hearing was had; also that notice of the hearing of the application for the temporary writ was not essential.

Counsel for the city did not claim in this court that the city could repeal the grant after it had been accepted and performed in part by defendant, if its original action in making it was valid. In our consideration of the case, we will assume that the grant, if the city had power to make it, constituted, after the acceptance, a contract between the parties, the obligation of which could not be impaired by the action of one of them.

Counsel contended, however, that the grant was invalid for the reason that the city had no power to give to defendant an exclusive privilege to use the street. But, if these premises were conceded, it would follow only that the city, notwithstanding the grant to defendant, might lawfully confer the same privileges upon others, and not that the grant of the privilege to it did not confer upon it the right to use the street for the purpose intended.

Coming, then, to the ground upon which the court placed its ruling, we deem it unnecessary to enter upon any discussion of the question whether an injunction should be granted against a mere threatened nuisance; for the record discloses a state of facts which, to our minds, afford a very conclusive reason why plaintiff ought not to be permitted to maintain the action. The ordinance making the grant was attached as an exhibit to the pleadings, and is set out in the abstract. It is simply a grant of the privilege to construct and maintain a street railway in the streets and alleys of the city. It provides that the track of the railway shall be made to conform to the established grade of the streets, and that it shall be planked at the crossings. There are no provisions as to the rail which shall be used on the track, or the gauge upon which it shall be constructed. Now, the council of the city is vested by law with the power to determine the condition of repair in which the streets shall be kept. They have full control over the streets, and they may make any reasonable and necessary regulation as to the manner in which they shall be used. It does not appear to us that their powers in this respect are at all affected by the contract with defendant. The city may require defendant to so exercise the privileges conferred upon it by the grant as that the use of the street for ordinary purposes will not be unreasonably interfered with. It has the power to make all necessary and reasonable regulations as to the manner in which the track shall be constructed, and the condi-

POWER OF CITY OVER STREETS AND TRACKS.

tion in which it shall be maintained. It has the power, also, to enforce its regulations. Having these powers in its own possession, it does not need the aid of a court of equity. Injunction is an extraordinary remedy, and it will be granted only when the party is likely to suffer some irreparable injury against which he has no other speedy or adequate remedy. Clearly, plaintiff is not in that condition. We find it unnecessary to consider whether the writ should have been dissolved because no notice of the application was given to defendant.

Reversed.

Regulations as to Tracks of Street Railways.—See State v. Chicago, etc., R. Co., 17 Am. & Eng. R. R. Cas. 170; Pembroke v. Canada Cent. R. Co., 14 Ib. 117.

STATE *ex rel.* MORRIS *et al.*, Appellants,

v.

HANNIBAL AND ST. JOSEPH R. CO.

(86 *Missouri*, 13.)

It is the duty of a railroad company, without a statutory requirement to that effect, to so construct its road as not to prevent the public from using its highways, and this duty is a continuing one.

Mandamus is an appropriate remedy to compel the restoration of a highway, by a railway, to its proper condition, and, in this respect, to the company to perform its charter duties.

It is sufficient for the relators in such proceeding to show that they are citizens and thus interested in the performance of a public duty.

In a *mandamus* proceeding to compel a railway company to so construct its road as not to prevent the public from using a specified part of a highway, it is no defence that the track had formerly been placed in the highway by another railway company. Such fact is no justification of the continuance of the obstruction of the highway by defendant to the entire exclusion of the public.

APPEAL from Clay circuit court. Hon. G. W. DUNN, Judge.

Reversed.

Samuel Hardwicke and *Simrall & Sandusky* for appellants.

George W. Easley for respondent.

BLACK, J.—The relators, judges of the county court of Clay county, and the road overseers, sued out an alternative writ of *mandamus*, requiring the respondent to so construct its road, where it FACTS. passes along a specified portion of a public highway, as not to prevent the public from using the highway, or show cause,

etc. Upon a trial of the cause, upon an agreed statement of facts, the peremptory writ was denied. Respondent has failed to file any abstract or brief, and we shall look to appellant's abstract as a full and true statement of the case.

The Kansas City, Galveston & Lake Superior R. Co. was created under a special act passed in 1857; subsequently, its name was changed to the Kansas City & Cameron R. Co.; and, still later, that corporation was consolidated with the respondent, The Hannibal & St. Joseph R. Co. In 1848, the county court of Clay county established a public highway through a part of that county, and along the foot of the Randolph Bluffs, upon a narrow space of level land. From thenceforward this road was used as a public thoroughfare. Long subsequent thereto the railroad company procured a right of way from the owners of the land, and, in 1867, the railroad constructed its road close to the river, using for that purpose a part of the public road. This rendered the public road more or less unsafe, but it was still continuously and largely used as a public road until 1879. In that year the St. Louis, Kansas City & Northern R. Co., claiming a track under certain proceedings to condemn a part of the right of way of respondent, removed the road of the Hannibal & St. Joseph R. Co., and placed it in the public road, at the same time placing its own road where the Hannibal & St. Joe road-bed was formerly located. The latter company has continued to use its road thus re-located ever since. By reason of all this, the public road was wholly obstructed, and this obstruction has been continued from that time to the filing of this suit. It appears the respondent endeavored to restrain the St. Louis, Kansas City & Northern R. Co. from thus moving its road, but did not succeed in so doing.

The eleventh section of the charter of the Kansas City, Galveston & Lake Superior R. Co. provides: "Said company may build said road along or across any state or county road . . . but wherever said railroad shall cross any state or county road, said company shall keep good and sufficient cross-ways, or adequate facilities for crossing the same; and said railroad shall not be so constructed as to prevent the public from using any street, road or highway along or across which it may pass." This statute is clear and explicit. The duty to so construct the railroad as not to prevent the public from using the highway is a continuing one. This duty to so construct the road would be so without the statute. Nothing but express statute will relieve the company from the duty of restoring the public road, which it crosses, to its former usefulness. People *v.* C. & A. R. Co., 67 Ill. 118.

Mandamus is an appropriate and proper remedy to compel the restoration of a highway to its former state, and, in this respect, to require the corporation to perform its charter duties. High on

Ex. Legal Rem., sec. 320; 2 Rorer on Railroads, 934. The question here is one of public right, and the better opinion is that it is sufficient for the relators in such cases to show that they are citizens, and thus interested in the performance of a public duty. It was not necessary that the proceedings should be presented by a law officer of the State. It was eminently proper for these relators to institute this proceeding, though they do so in their private and not official capacity. Union Pac. R. Co. *v.* Hall *et al.*, 91 U. S. 343; High on Ex. Legal Rem., sec. 431. These principles of law appear to be incorporated in the instructions given by the court, but it would seem that the writ was denied on the ground that the remedy had been lost from acquiescence of the public, and on the further ground that the respondent was not responsible for the obstruction. There is nothing to show that the public have acquiesced in this wrongful use of the road. It is true the railroad was placed partly in the public road and so used up to 1879, but the travel thereon was not obstructed. It was open and used as a public road all the while. It is not for this use the complaint is made, but it is made because of the total obstruction in 1879, and the continuance thereof ever since that date. As to this we do not find an element of acquiescence in the general facts, The public was, simply, without authority of law, so far as this record shows, ousted of the entire use of the road, with no effort on the part of either company to provide another roadway. State *v.* Culver, 65 Mo. 607.

MANDAMUS LIES TO RESTORE HIGHWAY.

RELATORS.

ACQUIESCENCE IN WRONGFUL USE OF ROAD.

We do not see how the act of the St. Louis, Kansas City & Northern R. Co., in taking up the road-bed of the respondent and placing it in the public road, can justify the latter in letting it remain there, and continuing the use thereof, so as to entirely obstruct the travel. It may be that this act of the St. Louis, Kansas City & Northern R. Co. was in disregard of respondent's rights, but that cannot justify the continuance and use of the obstruction to the entire exclusion of the public. What the rights were, or are, as between these two companies, we are not at liberty to consider here, on this record. The relators are not responsible or the result of the litigation between them.

On the agreed facts there should have been awarded a peremptory writ.

The judgment is reversed and the cause remanded, with instructions to the circuit court to issue a peremptory writ.

RAY, J., dissents. The other judges concur.

STATE *ex rel.* MAHAN *et al.*, Appellants,

v.

ST. LOUIS, KEOKUK AND NORTHWESTERN R. Co.

(86 *Missouri*, 288.)

A railway company cannot, under the statute (G. S. 1865, p. 333; R. S. 1879, sec. 765), construct its road along or upon a public highway, except with the consent of the county court, and if it does so without such consent, a court of equity will interfere and grant the county appropriate relief.

The profile and map of the route of the defendant company through the county was filed, as required by statute (G. S. 1865, p. 337), in the office of the clerk of the county court in April, 1878, and the present action to restrain the defendant from using the highway was instituted in January, 1882; *held*, there was no such delay on the part of the county as to preclude it from asserting its rights against the company.

APPEAL from Hannibal court of common pleas.—Hon. THEODORE BRACE, Judge.

Reversed.

T. H. Bacon for appellants.

Anderson & Foreman and *H. H. Trimble* for respondent.

HENRY, C.J.—The petition alleges substantially the incorporation of the Mississippi Valley R. Co., and the Clarksville & Western R. Co., in 1871, and the incorporation, in 1873, of the Mississippi Valley & Western R. Co., under the laws of this State, and the incorporation of the St. Louis, Keokuk & Northwestern R. Co., in 1873, under and by virtue of the laws of the State of Iowa. FACTS.

The consolidation of the two first named and other companies with the Mississippi Valley & Western R. Co., and the acquisition by the latter of their franchises and subsequent acquisition by the defendant company of the franchises of the Mississippi Valley & Western R. Co.; that in September, 1872, the Mississippi Valley R. Co. filed in the office of the clerk of the county court of Marion its location map and profile according to the statute, showing said railway, so located, as one hundred feet wide and with the road-bed and track thereon in the centre of said railway, the same being a route for a railway afterward adopted and used, as hereinafter described; and that, on April 8, 1878, the defendant company filed in the office of said county clerk its map of the location of the

road-bed of its road through Marion county, but without showing the width of its railway, and this plat showed the location to be the same as that shown by the plat filed by the Mississippi Valley R. Co., in 1872. The petition then alleges that there were in said county of Marion three roads which, for a period of forty years, had been and were used as public county roads, upon parts of which the defendant's road was so constructed as to practically destroy them as public highways for ordinary travel, stating the particular manner in which this was done, which it is unnecessary to notice further than to say that the alleged obstructions sustain the general allegation.

It is further alleged that the occupation, use, and enjoyment of said roads and adjoining grounds by the defendant was, and is, entirely without the assent of the county court of said county; and that, on the contrary, the said county court and county have often protested and do now protest against such usurpation. The prayer of the petition is for an injunction to restrain defendant from running its road and rolling-stock over said parts of said public roads and for general relief. A demurrer to the petition was sustained, and from the judgment this appeal has been prosecuted.

CONSENT TO CONSTRUCT RAILROAD ON HIGHWAY.

The statute of 1865 authorized the construction of a railroad along or upon any public highway, but only with the consent of the county court. R. S. 1865, page 383, sec. 2. The petition alleges the filing of the plat or profile of its road by the defendant in April, 1878, and if there were nothing in the petition negativing the consent of the county court, it might be presumed from its long silence; but the petition expressly avers, and it is repeated, that neither the court nor the county ever consented to, but remonstrated against, the occupation of the county roads by the defendant for its road. Whether the consent of the county court was obtained or not is a question of fact, and so far from it appearing on the face of the petition that such consent was obtained, the contrary was expressly averred. If such consent was not obtained the defendant had no right to construct its road upon the county roads, and there had not been such a delay on the part of the county to assert its right as to have precluded it from doing so when this suit was instituted. This suit was instituted in January, 1882, and defendant's profile of the road was filed in the county court in April, 1878, less than four years before the commencement of this suit. If the facts are as alleged in the petition, the plaintiff is entitled to some relief in equity. What it should be the court can determine on a hearing of the cause.

The judgment is reversed and the cause remanded. All concur.

Construction of Railroad upon Public Highway.—See Indianola v. G. W.

T., etc., R. Co., 11 Am. & Eng. R. R. Cas. 314; Ruchner *v.* Chicago, etc., R. Co., 14 Ib. 447; Henderson *v.* Cen. Passenger R. Co. 20 Ib. 542; Conklin *v.* New York, etc., R. Co., 26 Ib. 365; State *v.* Mayor, 26 Ib. 400.

DUBACH

v.

HANNIBAL AND ST. JO. R. CO.

(*Advance Case, Missouri. June* 7, 1886.)

It is not competent for a city to authorize such use of a street, dedicated as a street, as will destroy it as a thoroughfare for the public use.

When the laying of a proposed railroad track would be a public nuisance, but an individual would sustain special damage as the owner of an abutting lot upon which he conducted his business, such individual has the right to institute suit for an injunction.

APPEAL from Hannibal court of common pleas.

Thomas H. Bacon for respondent, David Dubach.

G. W. Easley for appellant, Hannibal & St. Jo. R. Co.

HENRY, J.—By amendment to the charter of the Hannibal & St. Jo. R. Co., approved March 3, 1855, the company was authorized to build its road over streets, alleys, and wharves, in any town or village, corporate or not, but required the company so to construct the road "as not to hinder or prevent the public from using the same." Collier street, in the city of Hannibal, was FACTS. dedicated as a street, and the railroad company laid down its track on that street. Prior to the laying of the track in the street there were buildings on either side of the street, but it was graded by the defendant company nearly its width. At first defendant laid but one track; but after the plaintiff purchased his lot fronting on the street, and used by him as a lumber yard, the defendant laid a side track in the street about the year 1866. The main track was south of the centre of Collier street, and the greater part of the street was north of the north rail of the track. The switch was laid north of the centre of the street. Some time in the year 1882 the defendant made a contract with the Hannibal Transfer Co., giving to that company the use of defendant's tracks between the Mississippi river and the yards for taking out cribs of lumber on cars, and, in order to enable the transfer company to use cars

with cribs of lumber upon them, it was necessary to move the side track so that cars so loaded could pass upon the main track. The defendant obtained permission from the city, by an ordinance, "to change the location of its side tracks lying north of the main track on Collier street to a distance not exceeding sixteen feet from centre to centre of said side and main tracks, so as to admit the passage of cars on said main track loaded with cribs of lumber by cars standing on said side tracks." It was necessary to move the side track about four feet further from the main track to accomplish the object contemplated by the ordinance, and such removal of the side track that distance north virtually destroyed for other public uses that portion of the street north of said main track, which had been macadamized and otherwise improved by the city for general uses as a public thoroughfare. It is in evidence that, by moving the side track to the south, instead of north, of the main track, cars with cribs of lumber upon them could have passed, and the north side of the street left open for other vehicles and general travel.

The plaintiff filed his petition asking that defendant might be enjoined and restrained from removing the side track north, alleging the above and other material facts. On a final hearing the injunction was made perpetual, and defendant has appealed from the judgment.

It is true that it is settled law in this State that laying a railroad track in a street may be authorized by the legislature. Porter *v.* R. Co., 33 Mo. 138; Tate *v.* R. Co., 64 Mo. 158. But it must be done in the manner authorized. And the authority by which the defendant undertook to change the location of its side track required it "to be so constructed as not to hinder or prevent the public from using the street." If the character of a street should be such that defendant's track could not be laid upon the street without hindering the public from using it, then, no matter how important to the company that its track should be laid in that street, it could not be done.

LEGISLATURE MAY AUTHORIZE TRACK ON STREETS.

Nor is it competent for a city to authorize such use of a street, dedicated as a street, as will destroy it as a thoroughfare for the public use. Belcher Sugar Refining Co. *v.* St. Louis Grain Elevator Co., 82 Mo. 124. If, as the testimony seems to prove, the side track of defendant could have been removed to the south side of the street without materially interfering with travel upon the street, it was its duty, under the charter provision authorizing its use of the street, to place the side track there. Railroad companies, in laying their tracks upon the streets of towns and cities, should have some regard to the rights of the public, and especially of owners of lots abutting upon the streets. No complaint, it

seems, would have been made if the side track had been placed upon the south side of the street. The public travel over the street was on the north side, which the city had macadamized for that purpose, and we see in the record nothing to justify the defendant in removing its side track north, instead of south, of the main track.

There can be no doubt of plaintiff's right to institute this suit. The track laid as proposed would, it is true, be a public nuisance, but plaintiff would sustain special damage as the owner of an abutting lot upon which he conducted the business of a lumber merchant. Belcher Sugar Refining Co. *v.* St. Louis Grain Elevator Co., *supra*.

The judgment is affirmed.

All concur.

Public Use of Street.—See Fifth Nat. Bank *v.* N. Y. Elevated R. Co., 23 Am. & Eng. R. R. Cas. 146; Gulf, etc., R. Co. *v.* Fuller, 23 Ib. 154; Texas, etc., R. Co., 23 Ib. 160.

REDINGER

v.

MARQUETTE AND W. R. Co.

(*Advance Case, Michigan. June* 24, 1886.)

A mining company owned certain land near a city, which it platted, reserving "the exclusive right to lay a plank or railroad track through and across any of the streets reserved on the map." The street down which it seems they intended to run their road was laid out much wider than the rest, and was partially occupied for such purposes. Subsequently they assigned all their rights to a railroad company, which proceeded to build four tracks down this street, after having gained the city's permission so to do. A property-owner along this street obtained an injunction against the company, and upon appeal it was held that the company had no right to blockade the streets without compensating property-owners, and that the foregoing reservation in the plat did not give them the privilege to destroy the usefulness of private property.

Where a city possesses certain rights and powers over property added to its territory, and the streets therein, such rights cannot be controlled by reservations in the plat which are against public policy.

The reservation, in a plat of an addition to a city, of the right to occupy streets for railroad purposes, is only a reservation as against the city, and cannot be used to oppress private property-owners.

In the plat of an addition to a city no rights can be reserved by the pro-

prietors inconsistent with the purpose of the dedication, or which would modify it, so far as purchasers of lots and the public are concerned.

The general method of construing provisions in deeds reserving rights and easements is to give them the force which the deed evidently intended they should have.

The purchasers of lots fronting upon a street have the right to have the street kept open for the usual and customary methods of travel, and the grantors cannot thereafter withdraw or change such public spaces to the detriment of the grantees.

In a grant of land, all which is necessary to the beneficial enjoyment of the thing granted, and which is in the power of the grantor to convey, will pass, unless expressly reserved.

APPEAL from Marquette.

W. P. Healy and *Isaac Marston* for complainant and appellants.

Ball & Hanscom for defendants and appellees.

SHERWOOD, J.—The Cleveland Iron Mining Co. was organized in April, 1853, under the act of February 5, 1853, for the purpose of iron mining in the county of Marquette, in the State of Michigan, and became the owner of an iron mine near Ishpeming, in said county, and also the owner of a parcel of land on the shore of Lake Superior, which the company platted into lots and streets, in FACTS. September, 1854, and caused the plat to be duly filed, and said parcel now forms a part of the city of Marquette. In making the plat, and dedicating the same, the company made a reservation referring to the streets therein in the following language: "Reserved to the Cleveland Iron Co., and their assigns, forever, the exclusive right to lay a plank or railroad track through and across any of the streets recorded in this map; also the exclusive right to use the same, with cars, engines, or any other vehicle they may choose; also the right of conveying, through pipes or otherwise, the water of Harlow's spring, or any other waters, through any of the streets of this plat, forever." There are, in the plat referred to, two blocks numbered, respectively, 2 and 3. In each of these blocks there are 22 lots. On the east side of these two blocks is Front street, it being 66 feet wide, and about 250 feet from the lake front as it is now established. Between the two blocks runs Superior street east and west, 100 feet wide, extending to the lake. The dock of the Cleveland Iron Mining Co. is at the foot of this street, and standing near the same and on the south side thereof.

The plaintiff is the owner of lot 2, in block 3, lying in the southeast corner of the block at the junction of Front and Superior streets, extending 30 feet on Front street, and 124 feet on Superior street. These streets intersect each other at right angles. At the time of filing the plat the Cleveland Iron Mining Co. had constructed the said dock upon its water-front, for shipping ore and

receiving merchandise, and had a strap-iron railroad, the cars of which were moved by horses or mules, extending from the dock westerly, across both of said streets, at their junction, and diagonally across the northern portion of block 3, into the mine of the company. The track crosses, in passing through the block, the extreme southwest corner of lot 2.

In 1857 and 1858 two additional tracks down Superior street, just south of the original track, and extending onto a trestle-dock were built, and these three tracks were continued in use by the company down to 1871, and operated by locomotives from 1858; and the two leading to the trestle-dock continued to be so operated until they were sold to the defendant, the Marquette & Western R. Co. Since 1857 the railroad has been doing a large and constantly increasing business, in shipping iron ore, pig-iron, and general merchandise, until in 1883, when there was shipped over these tracks something over 200,000 tons from the Cleveland mine alone. In 1883 the Marquette & Western R. Co. was engaged in building a railroad from Marquette to the iron mines at Negaunee and Ishpeming, and purchased of the Cleveland Iron Mining Co., at Marquette, its entire water-front, shipping dock, railroad tracks, and land occupied thereby, all its reserved rights in the streets, and its real estate remaining unsold, and the parcel of land platted as aforesaid. The reserved rights in the streets referred to are the same quoted above, and contained in the same language.

The plaintiff's lot was sold by the Cleveland Iron Mining Co. to William J. Gordon and Peter White on the 22d day of August, 1857, by warranty deed, for the sum of $4300; the conveyance containing the following clause: "Reserving therefrom all that part of said lot above described, which is now used or occupied by said Cleveland Iron Mining Co. for railroad or railway purposes, to be used and occupied by the said Cleveland Iron Mining Co., its successors and assigns, so long as needed or desired by them for said railroad or railway purposes." The lot was described in this deed by metes and bounds, and on the south by the north line of Superior street. On the 14th day of June, 1865, Gordon conveyed his interest in lot 2, in block 3, by warranty deed containing the same reservations, to Peter White, and the complainant made his purchase of this lot of Peter White, in March, 1869, receiving his deed therefor on the 7th day of December, 1872; it being a warranty deed, and containing same reservations as mentioned in the conveyance of the property by the Cleveland Mining Co. to said Gordon and White.

From the time of complainant's purchase of this lot, down to the time of the commencement of this suit, he used and occupied the property in his own business, renting some parts of the building as he could spare the same. About the month of October, 1883,

after the Marquette & Western R. Co. made their purchase, they began grading, for the purpose of bringing their ore cars on the trestle, and for that purpose it was necessary to bring them upon the tracks crossing Front and Superior streets. It was also the purpose of defendant to change the tracks further to the south upon Superior street, and add another track crossing said streets. The work of grading to make such connection with the tracks purchased of the Cleveland Iron Mining Co., as before mentioned, continued until the grade had been completed, and their tracks laid to the east side of Front street, and were about to proceed with the work of grading across Superior street. At this time William Ward and James Dwyer, who owned the land on the southwest corner of Front and Superior streets, and who claimed that the changes proposed to be made by the Marquette & Western R. Co. were unlawful, and, if completed, would seriously injure their property, obtained a writ of injunction restraining the further progress of the work, on the 19th day of January, 1884. This injunction was afterwards dissolved, upon the defendants giving a bond. One of the grounds taken in the Ward and Dwyer bill was that the right of way across or in the streets had not been granted to the defendants by the city, and, on the 6th day of February following, the common council of the city passed the following resolutions:

"Whereas, The Marquette & Western R. Co. has applied for permission to lay its tracks and run its cars in Front and Superior streets, as shown on a plan this day filed with the recorder:

"Resolved, that said Marquette & Western R. Co., and its successors and assigns, be, and are thereby, licensed to construct, and operate and maintain, for general freight, ore, and passenger business, a double track along the line now surveyed therefor, from the east line of Front street, northwesterly, across Front and Superior streets, to the north line of Superior street, so as to intersect and connect with the Cleveland Railroad track at or near the north line of Superior street, as shown on a map thereof filed with the recorder by the manager of said company; and also to build a trestle and such railroad tracks as they may require, easterly, from a point in said track east of Front street, to the new ore dock to be built by said company, as shown by the map aforesaid: provided, that this resolution shall never be construed to divest the city of its control over said streets, or its right at all times to prescribe by ordinance the manner of running cars thereon, and to regulate the operation of said railroad as the public convenience or necessity may from time to time require."

The defendant, Marquette & Western R. Co., after dissolution of the injunction in the Ward and Dwyer Case, proceeded with the work of laying their three tracks in the manner proposed, inter-

secting said streets at such points as the company chose. Proofs were taken in that case, and the cause heard at the Marquette circuit, and the complainants' bill was dismissed. The case is now before this court on appeal.

The bill in this case was filed February, 1884, by the complainant, Redinger. In addition to the facts stated hereinbefore, it avers that the Cleveland Iron Mining Co. was organized for the purpose of carrying on a mining business in Marquette county; that for the purpose of transporting ore from its mine to the lake for shipment, the company constructed its railroad, which was known as the "Cleveland Branch Track,"—at first it being no more than a tram-way, and so continued until the locomotive power was used thereon; that said mining company is a private company, organized for a private business, and the said railroad was constructed to be used in that business; that the reservation contained in the plat was made with reference to that business, and that solely; and that the location of its tracks in said streets and its yards for the accommodation of that business, at the time the complainant made the purchase of his lot, was well known to all the parties.

The complainant further avers, in the language of his bill, "that the reservation of the right of way made in the plat extends several hundred feet northwest of your orator's said premises, and said defendants intend to use it as a railroad yard for switching freight and passenger cars, which was never contemplated by the original reservation. Your orator shows that the object of said reservation was to enable the Cleveland Iron Mining Co., its successors and assigns in the mining business, to transport any and all iron ore mined by them at Ishpeming over the railroad of the Bay De Noquet & Marquette R. Co. (now the Marquette, Houghton & Ontonagon R.), thence over said reservation, which connected with said last mentioned railroad, and thence onto the said ore dock of said Cleveland Iron Mining Co.; that when said reservation was made, the Cleveland Iron Mining Co. received all its ore over the said railroad of the Bay De Noquet & Marquette R. Co.; now the Marquette, Houghton & Ontonagon R. Co. that said railroad of the Cleveland Iron Mining Co. connected several feet northwesterly of your orator's premises with the yard and side tracks of the B. D. N. & M. R. Co.; that there was a down grade from said yards onto the ore dock of said mining company, whereby the ore cars ran by their own momentum, without the aid of steam, from said yard to said ore dock, whereby the annoyance to your orator was reduced to the minimum, and no ore passed over there except what was mined by said Cleveland Iron Mining Co. at Ishpeming, and transported during the season of navigation only, and such has been the course of business over said reservation since 1857 to the present time. And your orator, on information and

belief, shows and avers that for more than twenty years past, to wit, for the past twenty-six years, the said Cleveland Iron Mining Co. has used said strips, so reserved across your orator's said premises, only for transporting its own iron ore mined by it, and has occupied said strip during that time for no other purpose whatever, and was only using said strip for the purpose of transporting its own iron ore from the mines to its ore dock in Marquette at and before the time it made said reservation; that said Marquette & Western R. Co. announces that it expects to transport over its railroad at least five hundred thousand tons of iron ore annually, all of which, under the proposed plan of crossing Front and Superior streets, must be run across your orator's said premises up grade, and then run back again onto said ore dock (and will not be the ore of the Cleveland Iron Mining Co., its successors or assigns), thus carrying one million tons of ore annually across your orator's said premises, and then after unloading on the ore dock the empty cars must be pulled off, and run past your orator's said premises, back again, so as to be sent up to the mines for more ore; whereas, during the year 1883, the Cleveland Iron Mining Co. transported over your orator's premises only one hundred and thirteen thousand six hundred and seventy-five tons, all mined at its own mines at Ishpeming, which was run on the dock without steam-power as aforesaid. And your orator further shows that the contemplated action of said railroad companies, in erecting a passenger depot at the Tremont House, to be used during all seasons of the year; in making a railroad yard of the railroad which crosses your orator's premises; and in building a new railroad track in front of your orator's said premises, at the intersection of Front and Superior streets,—will depreciate the value of your orator's said premises one half, and will hinder and greatly interfere with your orator's business, if not altogether destroy it."

Complainant further avers that there is no necessity for either of the defendants crossing and recrossing said streets to reach good dock facilities on the lake front; that equally as feasible routes are as accessible for the purpose, and at very slight additional expense, as the course now, and intended to be taken, and which destroys the complainant's property; that the common council has no authority to license any such use of the streets, and that their action in the matter is void; that neither of the defendants have ever compensated the plaintiff for his damages, or offered to do so; but, on the contrary, the said Marquette & Western R. Co. intend to build a new ore dock, and use said streets to the extent they please, not only that portion formerly running to the mines of the Cleveland Iron Mining Co., as contemplated in the original reservation, and covering only that portion of the complainant's premises so reserved, but assert the right to use, under such reservation, as much

of complainant's ground as may be necessary or desirable for the company in doing a general railroad business. And complainant denies the defendants' right to make such use of his land, or of the said streets, for such purpose, until they have in some legal manner acquired such right from him, and paid him reasonable compensation therefor. The complainant further states his claim, as to the effect of the Cleveland Iron Mining Co.'s action, as follows:

"Your orator shows that the aforesaid strip across your orator's premises has not been used or possessed by the said Cleveland Iron Mining Co. since the 1st of December, 1883, and said Marquette & Western R. Co. has not yet taken visible or actual possession thereof; that since your orator learned of the sale of the reservation of right of way across your orator's premises to the Marquette & Western R. Co., he has regarded it as a violation of his rights, and subjecting the reservation to forfeiture; and your orator has accordingly peaceably entered on said right of way, and taken peaceable possession thereof, and declared said reservation forfeited, and does hereby solemnly declare it forfeited, null and void, and asks that said defendant railroad companies be restrained from entering on that part of your orator's said premises lately covered by said reservation. That said strip, so used by the Cleveland Iron Mining Co., across your orator's premises, has reverted to your orator, because (1) it is no longer needed or desired by the Cleveland Mining Co.; (2) it could only be used by the assigns of the Cleveland Iron Mining Co. for carrying iron ore mined by them, and said Marquette & Western R. Co. cannot engage in the business of mining iron ore, and hence cannot use said strip for the purposes for which it was reserved; and (3) that said sale to the Marquette & Western R. Co. carves the original reservation of the Cleveland Iron Mining Co., which was indivisible in its nature, into an indefinite number of parts, being only limited by the number of mining companies that may choose to forward their ore over said railroad."

The prayer for relief is as follows: That said defendants be restrained "from beginning or proceeding to construct a railroad over or across said Front and Superior streets, or either of them, opposite or adjoining your orator's said lands at the intersection of Front and Superior streets, until the final determination of this suit; that the privilege granted by the common council of said city to said Marquette & Western R. Co., its successors or assigns, be declared void, and that such injunction be made perpetual; and that said city of Marquette be perpetually enjoined from granting any franchise at the intersection of said Front and Superior streets, which will practically destroy travel at said intersection of said streets; that said Marquette and Western R. Co., and said Detroit, Mackinac & Marquette R. Co., be also restrained by said writ of

injunction from entering on said strip of land across your orator's said premises until the final determination of this suit, and that then such injunction be made perpetual; that orator may have such other relief, and such further relief, as the nature of the case may require, and may be agreeable to equity."

The Marquette & Western R. Co. answers the bill, and admits that Front and Superior streets run and cross each other as claimed, and are public streets. It further admits and says "that the Detroit, Mackinac & Marquette R. Co. is the owner of and operating the line of railroad from St. Ignace to Marquette, and that this defendant is building a line of railroad from said city of Marquette to the iron mines near Negaunee and Ishpeming, in said county, and that they are under one management, and form connecting lines of railroad. It admits that during the past year it has purchased the ore dock of the Cleveland Iron Mining Co., and the other property mentioned in the fourth paragraph of said bill, and has also purchased a strip of land extending northwestwardly from Superior street to the railroad track of the Marquette, Houghton & Ontonagon R. Co., a portion of which is the parcel of land in the southwest corner of said lot number two, lying south of the line above described. And this defendant says that said strip of land, before its said purchase, belonged to the Cleveland Iron Mining Co. in fee, and was purchased by this defendant from said mining company for use in operating the railroad tracks which had theretofore been constructed by the said Cleveland Iron Mining Co., and were already in operation, and also such other tracks as it should desire to construct and operate thereon. This defendant admits that it was, at the time of the filing of this bill, intending to build a railroad double track across the intersection of Front and Superior streets, and across Superior street, to intersect and unite with its double track already constructed across said street, so as to connect the railroad so already constructed by said Cleveland Iron Mining Co. with the railroad of this defendant from Marquette to the iron mines; and that for a portion of the distance across the said Superior street, after the construction of the said new tracks, there would be, according to said original design, four tracks in said street opposite the premises of the said complainant." And it avers its right to construct said tracks; that the reservation in the plat, and that contained in the deed under which the complainant claims, was, as matter of fact, an exception, and that the fee of the land to which it applied remained in the Cleveland Iron Mining Co., and was by it duly transferred to the defendant; that the object the mining company had in making the reservation is of no materiality; that it is the right of the Marquette & Western road, under its purchase, to use said streets to such extent as the business of such railroad as it may

construct may require; and that neither the complainant, nor the common council of the city, can complain or have any right to interfere.

Defendant, further answering, says that it admits it expects to transport over said railroad the amount of ore stated in said bill, and all it can get to transport; and denies that it will be any damage to the complainant; but, if it should be, the defendant cannot be made liable therefor. It denies there has been any forfeiture of the right to use said streets and lot by the Cleveland Iron Mining Co., and avers that said company held possession of said right of way across said lot and said streets until January 1, 1884, when said mining company delivered possession of the same to the defendant, and it has held and occupied the same ever since. It also claims the benefit of a demurrer.

The proofs in the case were taken in open court; and, after a full hearing of the case, the circuit judge rendered the following decree:

"It is adjudged and decreed that the portion of lot number two of block three of the Cleveland Iron Mining Co.'s plat of the city of Marquette, which is occupied by the said Marquette & Western R. Co., and is claimed by the said complainant in his bill as his property, was excepted from the conveyance of the Cleveland Iron Mining Co. to William J. Gordon and Peter White, made August 22, 1857, as set forth in the pleadings in this case. And it is further adjudged and decreed that the said Marquette & Western R. Co. has, as against the said Louis Redinger, a right to construct and operate its tracks across Superior and Front streets in the manner in which the same have been constructed and are now operated, and as the same were about to be constructed at the time of filing said bill. It is further ordered, adjudged, and decreed that the said complainant's bill be, and the same is hereby, dismissed (but without prejudice to any proceedings that may be hereafter instituted by the complainant to establish a right of way or passage across said strip of land so excepted, to the west end of said lot number two, if he shall deem himself entitled thereto), and that the said complainant pay to the defendants their costs and charges in this suit, to be taxed, and that the said defendants have execution therefor." The complainant appeals to this court.

No question is raised touching the proper execution of the plat, nor that it was duly accepted. The answer admits that the streets thereon have been in use by the public more than 20 years. The defendants, organized under the railroad laws of this State, claim the benefits of the reservation made by the Cleveland Iron Mining Co. in the plat, as its assignees or grantees, and the right to construct their roads in and across Front and Superior streets in front of the complainant's property, to be used for all kinds of railroad

purposes, irrespective of any damage he may sustain thereby, and without condemnation or making any compensation therefor.

In the view I take of the case, the reservation contained in the plat is entirely immaterial, whether valid or invalid. There can be no question, I apprehend, but that the plat, under the facts stated in the record, must be regarded as valid. This being the case, the city of Marquette possesses certain rights and powers over the added territory, and the streets therein, that cannot be controlled by such reservations as are herein made, if against public policy or public welfare; and courts would certainly not allow them to be so used as to destroy or impair private property if they were ever so intended; but there is no reason to believe that any such object was intended when the proprietors caused the plat to be made and filed. The reservation in the plat, if good, was one against the city or public right. The plat, so far as the streets are concerned, is no more than a dedication or conveyance of the same for the use of the public, and no rights, if attempted, can be reserved by the proprietors inconsistent with the purpose of the dedication, or which would at least modify it, so far as purchasers of lots and the public are concerned. This seems to have been understood by the Cleveland Iron Mining Co., as relates to purchasers of lots, because, in its conveyance to such parties, the reservation contained in the plat is not referred to in the deeds.

RESERVATION IN PLAT IS IMMATERIAL.

The action taken by the common council of the city of Marquette has no bearing upon the questions involved between these parties. It gave the defendants the right, so far as it could, to use the streets of the city upon which to construct their tracks and operate their railroads. This, however, would not authorize the defendants to so manage and control the streets as to prevent their reasonable use as highways by the citizens, or to use them in such manner as to injure or destroy private property abutting on the streets, without condemnation or recompense.

ACTION BY COMMON COUNCIL.

The rights of the parties in this case must be determined by a proper construction of the several deeds under which they claim from the Cleveland Iron Mining Co., and the statutes relating to it, and the defendants' right to take, hold, and enjoy real estate. The complainant obtained his rights in lot 2, whatever they may be, through the deed of the Cleveland Iron Mining Co. to Gordon and White, and from Gordon to White, and from White to complainant, with such other interests therein, if any, which have become appurtenant thereto, through user or lapse of time. The complainant's interest was first secured by contract from Peter White, dated March, 1869, under which the complainant went into possession, and which was continued until the com-

DEEDS CONSIDERED.

mencement of this suit. The complainant received his deed in December, 1872. The description of land contained in the deed, and the reservation relating thereto, is as follows: "All that certain piece or parcel of land situate and being in the city of Marquette, county of Marquette, and State of Michigan, bounded and described as follows, to wit: So much of two lot (2) in block three (3) of the Cleveland Iron Mining Co's. division plat of said city bounded as follows, to wit: Commencing at the southeast corner of said lot No. two (2), at the corner of Superior and Front streets; running thence northward, along the west line of Front street, thirty feet; thence westwardly, in a line drawn parallel with the south line of said lot, to the west end thereof, one hundred and twenty-four feet; thence southwardly, along the west line of said lot, thirty feet, to Superior street; thence eastwardly, along the south line of said lot, same being the north line of Superior street, to the place of beginning,—subject, however, to all the reservations for railroad or other purposes, mentioned in the deed from said Cleveland Iron Mining Co. to W. J. Gordon and Peter White, bearing date August 22, 1857 [and recorded in the registry of deeds of Marquette county, in Liber B of Deeds, on pages 428 and 429], together with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining." The reservations referred to are those hereinbefore given.

The contract antedates the conveyance to the Marquette & Western R Co. 15 years, and the complainant received his deed three years later. When the complainant received his deed, the plat had been on file, and Front and Superior streets used, more than 18 years, and the complainant's lot had been built upon and used several years before the complainant's purchase from White. The conveyances making up the complainant's chain of title are all warranty deeds, and convey the fee of the property discharged from liens and incumbrances except such as may be included in the reservation contained in the Cleveland Iron Mining Co's. deed to Gordon and White; it being the same made and referred to in the complainant's deed to the plaintiff. It therefore becomes most important to ascertain the scope and extent of this reservation.

Both these defendants came into existence by virtue of the statutes of our State, and are controlled and limited in all they do thereby, and the same is true of the Cleveland Iron Mining Co. The right of this latter company to convey the lot 2, by deed, with the reservation in question, to the complainant's grantors, is not questioned; neither is there any question in my mind but that the complainant is the owner of the fee of said lot, subject only to such interests therein as are properly included in said reservation. The language of the reservation has hereinbefore been given. It secures to the Cleveland Iron Mining Co., "and to its successors

and assigns, so long as needed or desired for railroad and railway purposes," the right of way across the northwest corner of the said lot as it was *then* "used and occupied by the Cleveland Iron Mining Co.;" meaning on the 22d day of August, 1857. It is of but little significance by what terms this clause in the deed shall be recognized or designated in giving it effect in this case; and I quite agree with Chief Justice Campbell wherein he says, upon this subject, in the case of Hall *v.* Ionia, 38 Mich. 498: "The general, and, as we think, the correct, method of construing such provisions as those in question is to give them the force which the deeds evidently intended they should have."

It seems very clear to me that the extent of the reservation, under the testimony contained in this record, was, at the time it was intended to take effect, limited to the right of way across complainant's lot for a single track; and that it cannot be extended beyond that by the Cleveland Iron Mining Co., or its grantees, against the owner's consent, without condemnation, is, in my judgment, equally clear. I think, further, that the complainant's right to cross and recross the said right of way, to gain access to and make use of the west end of his lot, was not intended to be cut off by the easement mentioned in the reservation; that the complainant's constant exercise of such right to cross said rights of way for more than 20 years, with the full knowledge and consent, and without objection, on the part of the Cleveland Iron Mining Co., renders any other construction of the extent of the easement reserved unreasonable as evidenced by the action of all the parties interested. Such right of crossing and recrossing therefore becomes one of a substantial nature, and of value to the complainant, and entitled to protection in a court of equity.

The business of the Cleveland Iron Mining Co. was mining. Its mines were near Ishpeming, several miles away from the lake, where its ore had to be hauled. It owned a large lake-front, and the dock located thereon, and the company, for the purpose of facilitating the transportation of their ore to their water-front, constructed a private railroad from their mine to their dock on the lake. When the company platted their grounds, as hereinbefore stated, the streets were evidently laid out with reference to bringing the company's railroad over the plat, and down one of its streets, to the dock. It is very evident, from the language used in the reservation stated in the plat, that then but a single track was contemplated, and the street through which it was to pass was laid out 100 feet wide, instead of 66 feet as were the others. This increased width was undoubtedly intended to secure sufficient space in the street for the railroad track, and to prevent its interference with the ordinary business and travel upon the street.

I do not think, from what I have been able to discover in the

record, that the complainant, when he made the purchase of his lot, or when the company made the reservation under which they now claim to defend in this case, it was in the mind of any of the parties that the iron mining company's railroad was ever to be used as a common carrier, or for general railroad purposes, but only as a private road, in connection with the company's mines, for the purpose of carrying its ore to their water-front on the lake. And the complainant, who now owns this valuable lot, well built up and abutting on said street, objects to the use made of it by the defendants, who claim to make such use as owners of said railroad, and the reserved rights contained in the company's deed to them, and to construct in said street, in front of his property, several additional tracks, and carry thereon, not only the iron ore from the Cleveland Iron Mining Co.'s mine, but carry on a general railroading business to such an extent as to prevent the use of the street for any other purpose, and make travel on the same dangerous, and create such noise and confusion as to greatly impair his business, and depreciate the value of his property; and he seeks the aid of a court of equity to prevent such unlawful encroachment upon the street, and such unjust infringement upon his rights. I have no doubt of his right to the aid he seeks, and I think the circuit judge erred in holding otherwise. Grand Rapids & I. R. Co. *v.* Heisel, 47 Mich. 398; s. c., 11 N. W. Rep. 212; Cox *v.* Freedley, 33 Pa. St. 124; Jarstad *v.* Morgan, 4 N. W. Rep. 27; Kneeland *v.* Van Valkenburgh, 1 N. W. Rep. 63; Ang. Highw., and cases cited.

USE OF ROAD TO BE PRIVATE, NOT COMMON.

Whether the dedication of the streets to the public, contained upon this plat, is valid or not, the purchaser of a lot fronting upon such street has the right to have the street kept open for the usual and customary methods of travel. The grantors "cannot thereafter withdraw or change the use of such public spaces, to the detriment of the grantees, and the destruction of their rights in the street or public grounds on which their lots abut. Grand Rapids & I. R. Co. *v.* Heisel, 47 Mich. 396; s. c., 11 N. W. Rep, 212; Smith. *v.* Lock, 18 Mich. 59; White *v.* Smith, 37 Mich. 291. In none of the deeds given by the Cleveland Co. under which the complainant claims, is there any exception or reservation of any right in the streets. In a grant of land, all which is necessary to the beneficial enjoyment of the thing granted, and which it is in the power of the grantor to convey, will pass, unless expressly reserved in the deed of conveyance. The free use of a street in a city devoted to business purposes is absolutely necessary to the full and beneficial enjoyment of all the rights contained in the grant of abutting property thereon; and, when a party is deprived of such use, to turn him over to the uncertain and usually inadequate remedy at law would

VALIDITY OF DEDICATION.

be a poor apology indeed for proper redress. Courts will never allow such destruction of property, so long as an effective preventive remedy exists, and is properly invoked, as in this case.

It is difficult to conceive of any justifiable ground which can be urged for the course taken by the defendants. The Cleveland Iron Mining Co. could not legally make any such encroachments upon the street, producing the injury complained of, and certainly it could not transfer the right so to do to the defendants, or either of them, and, under the law which allows them an existence, they could only do what they have done, and propose to do, legally, when properly organized for that purpose, after condemnation had, and reasonable compensation made for all damages.

The decree must be reversed, with costs of both courts. The case must be remanded to the circuit for such further proceedings as may become necessary; and, unless within such reasonable time, not exceeding six months, as the circuit judge may determine and designate, the defendants shall, in some legal manner, obtain the right to the easement they desire in the complainant's premises and in said streets for the exercise of the franchises they now claim, and make proper recompense therefor, and for the injury already sustained by the complainant, the injunction must be revived and made perpetual.

MORSE, J., concurred.

CHAMPLIN, J., concurred in the result.

CAMPBELL, C.J.—I agree in the result reached by my brother Sherwood, but I do not think it necessary, in deciding these cases, to go beyond the necessities of the records, and dispose of questions in which persons not represented here may be interested. This controversy only affects the rights of certain lot-owners upon a single street and its immediate approaches. Redinger is interested, both as subject to a burden upon his lot itself, and as a bordering owner. The other complainants are interested only as owners of land upon the highways. The bill in each case recognizes the legality of the occupation by the old railroad proprietors of the land over which their road ran, subject to the uses and in the manner appropriate and usual in that occupation before the present defendants obtained their interests. That occupation had continued so long as to preclude complainants from setting up any right in equity to have it disturbed. Whether it was or was not in complete correspondence with the theoretrical and strictly legal rights of the owners had ceased to be important. It could not be disturbed after such long acquiescence, and it would include any such

RIGHTS OF PARTIES NOT REPRESENTED NOT TO BE CONSIDERED.

natural and direct increase of use as would spring from the mere development of the same business. But it would include nothing more; and, if any larger rights are to be set up, they must be founded on something else than long occupation. I am satisfied that such right of way as was contemplated by the reservation in the plat in the streets was confined to such use as would harmonize with highway purposes, and was also intended for such principal uses as would subserve the mining interests which required a shipping port. In the street in question the practical construction put upon it by the owners themselves confines them to this as the real object intended. There could be no legal objection, and there was no objection made, to any accommodating use for persons or freight which did not seriously add to the burdens of the persons interested in the street, and no complaint is made in the bills in these cases of any use which was not substantially more burdensome than that which had been kept up. On these records that must be recognized. I think the condition or burden in Redinger's deed—the precise legal name of which is not at all important—describes very clearly the nature of the burden in the street also, and allowed Redinger any enjoyment of such passage over the track to his premises as would not interfere with the convenient use of the tracks, to which it must be subservient. The same is true of the street itself, which could not be made subject to any substantially different burden upon its use as a street.

The transfer to defendants made an entirely different franchise or easement from the old one. Under the old use the primary purpose was not that of general common carriage. So far as that business was done, it was incidental to the proper uses, and could not, without encroachment, be allowed to become anything else. The intended use now has no limit of amount or method, and is substantially as great a change as if it were a new undertaking. The case shows that what was formerly a comparatively trifling invasion of the ordinary uses of property has become a use which predominates over everything else, and which very greatly damages the complainant's property, and makes its enjoyment much less available. The grievance comes within that class of mischiefs for which equity affords the plainest remedy. If there had been no previous use of the street by the railway, it would be hard to find a more serious invasion of right. But the fact that there is a limited use which is conceded to be valid, introduces a consideration not to be overlooked. Our statutes now provide for assessment of damages for the use of streets, where they are allowed by the proper authority to be occupied by railroads. There is no legal authority for allowing that occupation to destroy the highway. In the present case, the occupation for the new purposes is capable of appreciation; and, in my opinion, the defendants, unless they

compound with the lot-owners, should be compelled to have the right of way condemned and paid for within some reasonable time, or be perpetually enjoined from changing the old use, and compelled to respond for such damages as have already accrued.

I think the cases should be reversed, and the court below should be instructed to enter a decree for a perpetual injunction against the new uses, unless within some reasonable period, not exceeding six months, proper measures be taken to have the right of way over Redinger's lot and in the street condemned. If the parties prefer, it can be done by a commission or jury ordered in these cases, and reporting the result to the court, which, after the ascertainment in either way, can make such final disposition as may be necessary to meet all the equities.

CHAMPLIN, J., concurred.

INDEX.

NOTE.—The mode of citing the American and English Railroad Cases is as follows:

29 Am. & Eng. R. R. Cas.

The index contains references to the decisions and to the notes. References to the decisions are to the pages upon which the cases begin. References to the notes are to the pages upon which the propositions stated in the index are found. References to Constitutional or Statutory Provisions are to the pages upon which they are cited.

ACCOUNTS.

See "NET EARNINGS."

The expenses defrayed or incurred in producing the earnings for a given interest period are the only charges which can enter into the income account for that period, except the payment of interest on prior incumbrances, as stipulated by the terms of the mortgage; and the company cannot charge against income, for any period during the life of the mortgage, a payment or a liability incurred on account of old indebtedness existing before the mortgage was created, or arising from a loss incurred by the sale of bonds issued to pay off old indebtedness. Barry *v.* Mo., Kan. & Tex. R. Co. (U. S. C. C.). 384.

Where a mortgage is executed by a railway company to a trustee, conditioned for the payment of interest upon the bonds secured by the mortgage at semi-annual periods out of the surplus earnings of the company, the mortgagor owes a duty to the bondholder to keep such an account of its earnings and expenses as will show the net results of each interest period, and the trustee owes an active duty to the bondholders in the supervision of the account. Barry *v.* Mo., Kan. & Tex. R. Co. (U. S. C. C.). 384.

Where the bonds are coupon bonds, and such an account has not been kept for a series of years, upon an accounting the holders of coupons are entitled to have the interest earned during each interest period applied upon the coupons representing that period. Barry *v.* Mo., Kan. & Tex. R. Co. (U. S. C. C.). 384.

ACTION.

See EMINENT DOMAIN.

By coupon holder. See COUPONS.

Interest of plaintiff. The possession and working of a mill by the plaintiff without interference, after as before his conveyance of the land (upon which was the mill-site) to a trustee for the benefit of his wife, afford

ACTION—*Continued.*

prima facie evidence of such a personal interest in its operations as entitles him to maintain his action for the damages he has himself sustained, notwithstanding the trustee may sue for such damages as may affect the land as an inheritance. Salisbury *v.* West. No. Car. R. Co. (N. C.). 518.

Where the legal right is vested in a trustee all actions at law which affect the trust must be brought in his name. Penna. R. Co. *v.* Duncan (Pa.). 354.

AGENT.

See CARRIER.

Defined. The word "agents," as used in section 3412, R. L. Vt., making railroads and their agents liable for injury to animals by reason of a failure to fence their tracks, includes engineers. St. Johnsbury, etc., R. Co. *v.* Hunt (Vt.). 284.

ANIMALS.

See CONSTITUTIONAL LAW.

As to failure to fence, and pleadings in actions for injuries owing to defective fences, see 296 *n.*, 297 *n.*

Care. Stock law. Instruction. An instruction that much less care is required of railroad companies in providing against stock on its track since the passage of the stock law requiring stock to be inclosed, is correct. Joyner *v.* South Carolina R. Co. (S. C.). 258.

Cattle at large not trespassers. Cattle, horses, and other live stock running at large are not trespassers when they go upon the track of a railroad company, nor are their owners liable for damage resulting to the company from their going upon the track and an engine or train of cars running upon them. Savannah, etc., R. Co. *v.* Geiger (Fla.). 274.

Cattle at large. Risks of owner. Though owners of cattle and other live stock have the legal right to turn them out to range, yet in doing so they assume the risk of any danger which may result to the stock from their going upon the railroad track and being run upon by a train, when the circumstances are such as to render running upon them unavoidable notwithstanding the use of reasonable care by the person operating the train to avoid it. Savannah, etc., R. Co. *v.* Geiger (Fla.). 274.

Cattle-guards out of repair. Evidence. 295 *n.*

Circumstances showing place where injury took place. 295 *n.*

Claims. Collection. Statute. The meaning of sections 1 and 2 of "An act to provide a means for the collection of claims for cattle and other stock destroyed by railroads" (chapter 2060, Acts of 1875), is that the "affidavit of the owner or some other person acquainted with the stock killed or maimed" shall be conclusive evidence of the amount of damages sustained by the owner, and such provision is void as not providing due process of law. Savannah, etc., R. Co. *v.* Geiger (Fla.). 274.

Common law as to. The common law, in so far as it requires the owner of live stock to keep them off the premises of another and renders him liable to the owner of such premises for the damage done by such stock, is not in force in Florida. Savannah, etc., R. Co. *v.* Geiger (Fla.). 274.

Contributory negligence. A railroad company is liable for injuring or killing cattle or other live stock upon its track by its trains whenever such killing or injury is the result of negligence upon the part of the agents operating the train. The fact that the owner of the live stock permits them to run at large does not constitute contributory negligence. Savannah, etc., R. Co. *v.* Geiger (Fla.). 274.

Destruction of crops. A railroad company is responsible for the destruction

ANIMALS—*Continued.*

of crops by cattle, where the fences of the land-owner along its line of road were destroyed by fire communicated from its track by reason of its engine scattering fire upon dry grass, which had been suffered by the company to accumulate along its track through its negligence. Miller *v.* St. Louis, etc., R. Co. (Mo.). 254.

Destruction of crops. Where the evidence showed that it was a good stock range around the plaintiff's field, and that many horses, cattle, and hogs came into the field after the fence was burned, and, in spite of all efforts to keep them out, destroyed the crop before the fence could be rebuilt, it was a natural result, as much to be expected as that the fire would destroy the fence in the first instance. Miller *v.* St. Louis, etc., R. Co. (Mo.). 254.

Duty of owner to drive them off track. Milburn *v.* Kansas City, etc., R. Co. (Mo.). 244.

Jurisdiction of justice of the peace. 294 *n.*

Killing. Double damages. In a county where the law restraining swine from running at large is in force, a railroad company is relieved from the duty of fencing against them merely to prevent their getting upon its track; but where its road passes through, along, or adjoining inclosed or cultivated fields it is under legal obligation to erect and maintain lawful fences on the sides of its roads, and is liable in double damages for injury to swine by its engines and cars where they entered upon its track from such fields, because of its failure to erect and maintain lawful fences along the sides of its road. Stanley *v.* Mo. Pac. R. Co. (Mo.). 251.

Killing stock. Evidence of employees in charge of train. Weight. 294 *n.*

Killing stock. Failure to have air-brakes. 294 *n.*

Killing stock. Instruction as to fences, etc. 294 *n.*

Killing stock. Verdict of jury not disturbed. 294 *n.*

Liability of stock killed for wrecking of train. 295 *n.*

Place of entry upon track, proof of. Lepp *v.* St. Louis, etc., R. Co. (Mo.). 242.

Place of killing, proof of. Lepp *v.* St. Louis, etc., R. Co. (Mo.) 242.

Presumption of negligence. The presumption of negligence established by the rule in Danner's Case, 4 Rich. 330, against railroad companies in actions for damages for the killing of stock on the track, upon proof by plaintiffs of their ownership and of the killing, is not restricted to cases where the defendant produces no testimony, and is not *ipso facto* destroyed by the introduction by the company of testimony purporting to show the attendant facts and circumstances of the killing so as to throw the onus upon the plaintiff of proving negligence from the facts brought to light by such testimony, whether exculpatory or not, but the presumption continues to have a controlling force until overthrown by defendant's making out affirmatively a case of due care or unavoidable accident. Joyner *v.* South Carolina R. Co. (S. C.). 258.

Prima-facie case of negligence. In an action by an owner of live stock against a railway company for killing or injuring the stock by its train, proof of the killing or injury is not of itself *prima facie* evidence of negligence upon the part of the company or its agents. To make out a *prima facie* case of negligence there must at least be evidence of circumstances from which a presumption arises that the stock would not have been run upon by the train but for want of care on the part of those operating it. Savannah, etc., R. Co. *v.* Geiger (Fla.). 274.

Prima-facie case. Proofs. The legislature may provide that proof of the killing or damage to live stock by a railroad train or engine shall be *prima-facie* evidence of negligence on the part of a railroad company or other person operating the railroad. Savannah, etc., R. Co. *v.* Geiger (Fla.). 274.

Stock breaking down fence. 295 *n.*

Stopping train to avoid killing. An instruction that if the train was running at lawful speed, and had the customary appliances and force of train-men,

ANIMALS—*Continued.*

and the stock, when it was or might have been seen by the engineer with due care, was so close that the train could not be stopped in time to avoid striking it, then the plaintiff could not recover, is correct. Joyner *v.* South Carolina R. Co. (S. C.). 258.

Trespassing on enclosed grounds. 295 *n.*

Unavoidable injury. Liability Where under the circumstances of the killing or injury it could have been avoided by the exercise of ordinary or reasonable care upon the part of the agents operating the train, and such care has not been exercised, the company will be liable; but if notwithstanding the exercise of such care the killing or injury would be unavoidable, the company is not liable. Savannah, etc., R. Co. *v.* Geiger (Fla.). 274.

ANNOTATION.

American cases upon the circumstances and conditions under which competitive transportation is conducted. 78 *n.*

Animals trespassing on enclosed grounds. 295 *n.*

A railway company cannot legally discriminate in favor of a traffic because of its origin or antecedents. 69 *n.*

A railway company cannot legally discriminate in favor of a traffic because of the ultimate use to which it is to be put after the railway transportation has been completed and ended. 70 *n.*

A railway company cannot legally discriminate in favor of one competitive shipper, shipping the same class of freight between the same competitive points, unless there is some substantial difference in the cost of the service to the company. 75 *n.*

A railway company cannot legally discriminate in favor of one local shipper against another local shipper simply because the former has agreed to ship the whole or some indefinite amount of his traffic over the defendant's line, while the other has not. 74 *n.*

A railway company cannot legally discriminate in favor of one local shipper against another local shipper merely to prevent a threatened competition at a point where no actual competition exists. 78 *n.*

A railway company has no right to discriminate between different local shippers by depriving one of them of a natural advantage which he may have over the other by reason of location, distance, etc. 71 *n.*

A railway company has no right to discriminate against an individual on account of his occupation or personal status. 66 *n.*

Articles in mortgage relating to default in payment of interest construed. 408.

Bridge over highway, construction of. 490.

Cattle-guards out of repair. Evidence. 295.

Circumstances showing place where injury occurred. 295 *n.*

Common-law duties as to signals, etc. 434.

Competition justifies lower rates. 60 *n.*

Conditional conveyances of right of way. 581.

Consequential damages. Embankment. 521.

Construction of agreement to prevent necessity of foreclosure. 392.

Construction of grant as to what lands were meant. 476.

Construction of railroad upon public highway. 608.

Contributory negligence of children. 439.

Crossing. Contributory negligence. 435, 436.

Crossing. Contributory negligence. Parent and child. 439.

Crossing. Degree of care required of railway. 436.

Crossing. Evidence of negligence. What sufficient to submit to jury. 435

Crossing, injury at. 440.

Crossing. Injury to passenger. 437.

Crossing, negligence contributory to injury at. 435.

ANNOTATION—*Continued.*

Crossing. Obligation to keep in repair. 439.
Crossing out of repair. 438.
Crossing. Six tracks. Fast train. Injury. 437.
Crossing. When view of track is obstructed. 435.
Dedication to public, subject to railway use. Suspension of public during railway use. Conveyance of grantor's interest in highway. 580.
Defect in crossing. 435.
Defective construction of bridge. 499.
Dissolution of corporations. 451.
Diversion of water used in operating mill. 521.
Double Damage Act, constitutionality of. 293.
Duty to fence. 293.
Duty to look and listen at crossing. Negligence. 434.
Ejectment. 544.
Elements of damage. 564.
Embankment. Injury by diverting surface-water. 525.
Equal rates under some English statutes. 59 *n.*
Equipment. Not necessarily the duty of company to furnish the latest improvements. 326.
Evidence as to negligence contradicted. Reversal. 296.
Evidence. Conversations between employees. 316.
Excess of speed may be proved. 294.
Facilities, can courts compel railways to afford? 53 *n.*
Failure to maintain fence. Knowledge of defect by plaintiff. 293.
Fair interests of railway to be considered in rate-making. 60 *n.*
Fence, complaint and proof as to. 296.
Fences. Gaps in fences. Injury to domestic animals. 296.
Fence, statement under Code as to. 296.
Force in America of English decisions as to Railway and Canal Traffic Act. 59 *n.*
Forfeiture of charters. 451.
Forfeiture of land grant. 476.
Gates, how to be made. 295.
General request to suspend section 4 not acceded to. 7 *n.*
Grant of alternate sections to N. P. R. Co. construed. 476.
Grounds *held* not a part of depot yard. 293.
Growth of bushes as evidence of negligence. 294.
Homestead rights against railway. 475.
Imperfect culvert. 518.
Indemnity or lieu lands. 475.
Injury by running down person coming from behind rear car. 436.
Injury to mill by obstructing natural flow of stream. 514.
Injury to spring of water. 539.
Instruction as to fences, etc. 294.
Killing stock. Evidence of employees in charge of train. Weight. 294.
Killing stock. Failure to have air-brakes. 294.
Killing stock. Jurisdiction of justice of the peace. 294.
Killing stock. Verdict of jury not disturbed. 294 *n.*
Land grants generally. 477.
Lease of road. Validity of oral agreement. 557.
Liability of company for acts of contractors and their servants. 589.
Liability of owner of stock killed for wrecking of train. 295.
Liability where one company runs trains on another's track. 115 *n.*
License and privilege taxes. 200 *n.*
Lookout. Duty of trainmen at crossing. 435.
Low bridge. 490.
Lumber near track burned. 181 *n.*
Manner of accepting proposition must comply with offer. 585.
Negligence. Averment of injuries. 438.
No opinion in advance as to rates. 7 *n.*

ANNOTATION—*Continued.*

Nuisance. Standing water. 533 *n.*
Object of the English statutes regulating railways. 59 *n.*
Obstruction of highway by bridge. 490.
Obstruction of natural flow of water-course. 502.
Obstruction of surface-water by railway bed. 525.
Obstruction to navigation. 494.
Onus probandi in actions for killing animals. 297.
Person on a railway crossing is not a trespasser. 434.
Pleading in cases of injury to animals. 296.
Private crossing. Notice of approach of train. 434.
Performance of condition precedent essential to compel conveyance. 582.
Public use of street. 611.
Railway land grants. 475.
Regulations as to tracks of street railways. 604.
Removal of herbage, trees, etc., by company in their right of way. 318.
Reservation of an easement by a deed of conveyance. 579.
Right to excavate on right of way affirmed. 582.
River bank. Right of way. Extent. 574.
Sale of lands before building of road. 477.
Signals at crossings. 434.
Signals at crossing. Both bell and whistle not necessary. 434.
Specific performance of contracts as to right of way. 548.
Speed. Violation of ordinance. 439.
Spring of water, diversion of. 539.
Station, compelling erection of. 485.
Stations and yards, duty to fence. 293.
Status of railway companies. 52 *n.*
Stock breaking down fence. 295.
Street railway. Rights and duties. 601.
Surface-water. Absence of channel. 525.
Surface-water: diversion of, by ditches. 529.
Taxation of railway lands. 476.
Taxation of track, etc., of company. 192 *n.*
Water-courses obstructed by bridge. 494.
What is a forfeiture of charter by non- or mis-user. 452.
What is not a forfeiture of charter. 452.
When a condition precedent is performed, conveyance may be compelled. 582.
When title passes. 476.
Whether a contract to convey is a lease, an option to purchase, or a deed. 579.
Whether title to one half of street passes by deed of abutting lot. 580.

ASSIGNMENT.

See CONTRACTS.

A right of action arising from a tort is assignable. Snyder *v.* Wabash, etc., R. Co. (Mo.). 287.

BONDS.

See ACCOUNTS; COUPONS; "NET EARNINGS."

BRAKES.

Failure to have air-brakes. 294 *n.*

Statute requiring, construed. Gen. St. S. C. § 1499, providing that good and sufficient brakes shall be attached to every passenger car, and to all freight cars except four-wheeled freight cars, and also upon every passenger train trusty and skilful brakemen, at least one to every two cars, and upon every freight train one to the last car of such train, does not apply to a mixed train of freight and passenger cars. Joyner *v.* S. Carolina R. Co. (S. C.). 258.

BRIDGES.

See HIGHWAY.

Boats going through draw. Knowledge that there are defects in a draw to a bridge does not relieve the owners of the bridge from all responsibility. And so, where a steamer had several times passed through such a draw without injury, but on one occasion was injured while passing through with proper care, in action for damage for such injury the judge properly refused a nonsuit. The failure of the steamer to "drop anchor and drag through," as is required of boats, etc., passing under a bridge (Gen. Stat. § 1115) does not affect this case. Crouch *v.* Charleston, etc., R. Co. 495.

Built by city. A bridge built by a railway company over a navigable stream within the limits of a city, for the use of the railroad, under an ordinance of the city granting permission, and providing the manner in which it should be built, may be regarded as having been constructed by the city, and as falling fairly within the power given it to construct and repair bridges, and regulate the use thereof. McCartney *v.* Chicago, etc., R. Co. (Ill.). 326.

Construction. 490 *n.*

Construction. *Damnum absque injuria.* Whenever the exercise of a right, conferred by law for the benefit of the public, is attended with temporary inconvenience to private parties, in common with the public in general, they are not entitled to damages therefor. A railroad company was authorized by the legislature of Louisiana to construct a railroad across that State, and as part of such road to construct necessary bridges for crossing navigable streams. The act made no provision for the form or character of such structures. A bridge across a navigable stream was constructed with a draw. In process of time it became decayed, and defendant in error, having succeeded to the the rights of the company, employed a contractor to construct a new bridge in its place, the work to be done at a time of the year when it would least obstruct navigation. The contractor complied with his contract as to the time; but owing to unusual rains the river continued navigable, and the work was unavoidably prolonged, thereby obstructing its navigation and preventing the vessels of plaintiff in error from passing beyond the bridge. *Held*, that this was a case of *damnum absqu injuriuy*. Hamilton *v.* Vicksburg, etc., R. Co. (U. S. S. C.). 490.

Construction, evidences as to. When one issue was, whether a bridge constructed by a railroad company across a stream had been so unskilfully constructed as to cause the waters of the stream to overflow, unskilled witnesses familiar with the bridge structure and the facts connected with the overflow were permitted to give their opinion as to whether the bridge, on account of being improperly constructed, caused the damage, and to state in that connection the facts within their knowledge. International, etc., R. Co. *v.* Klaus (Tex.). 500.

Defective construction of. 499 *n.*

Low. 490 *n.*

Obstruction of highway by. 490 *n.*

Obstruction of navigation by. 494 *n.*

CARRIERS.

See DISCRIMINATION, INTERSTATE COMMERCE ACT; INTERSTATE COMMERCE COMMISSION; RATES; STATIONS.

Contract releasing liability. In an action for damages for injury to the respondent's cattle, admitted to have been caused by the negligence of the appellant company's servants, it was admitted that the respondent had signed a consignment note, upon the face of which the company gave notice that they had two rates for the conveyance of cattle—a higher rate, when they took the ordinary liability of carriers, and a reduced rate, when the sender relieved them from all liability for loss, damage, or delay, except such as arose from wilful misconduct on the part of the company's servants; and in the note the respondent undertook to relieve the company from all liability, except as above mentioned, in consideration of having his cattle carried at the reduced rate. It was also proved that there was a notice in the office where the consignment note was signed, to the effect that the company had two through rates for the conveyance of live stock—viz., an "owner's risk rate," and the "company's risk rate," which was ten per cent higher, up to the statutory limit, but that the company did not "admit liability" in certain specified cases. The respondent denied that he had ever seen this notice, but it was proved that he had for some years sent cattle at the reduced rate. *Held* (reversing the judgment of the court below), that there was evidence that the company had offered to carry the respondent's cattle upon reasonable terms at the company's risk, and that therefore his contract to free them from liability in consideration of paying the reduced rate was good, and he was not entitled to recover. Great West. R. Co. *v.* McCarthy (Eng. H. L.). 87.

Equal rates under some English decisions. 59 *n.*

Facilities, can courts compel railways to afford? 53 *n.*

Force in America of English decisions as to Railway and Canal Traffic Act. 59 *n.*

Long and short haul: competition. The fact that there is competition in the carriage of persons or property to or from a particular place is a circumstance that justifies a common carrier under section 4 of the Interstate Commerce Act to charge less for a long haul to or from said place than a short one included therein. *Ex parte* Koehler (Oreg. U. S. C. C.). 44.

Object of the English statute regulating railways. 59 *n.*

Passes to families of employees. Section 2 of the Interstate Commerce Act in effect prohibits the giving of passes of free carriage to particular persons, and the exception allowed in section 22 in favor of officers and employees of the road does not include the families of such persons. *Ex parte* Koehler (Oreg. U. S. C. C.). 44.

Supply of cars. Authority of agent. Plaintiff, desiring to obtain, on the next day, cars for the transportation of stock, applied to the defendant's station-master at O. for the same. There being no telegraph at O., the station-master informed the plaintiff that the cars might not be forwarded in time, and requested him to go to L., a station on another line, managed by the defendants, and asked the station-master there to telegraph for the cars. Plaintiff did so, and the station-master at L., having telegraphed, afterwards told the plaintiff that he had received a reply, and the cars would be at O. at the desired time. The cars were not sent to O. until two days later than the date on which plaintiff claims they ought to have been forwarded. In an action to recover damages, *held*, that it was beyond the scope of the apparent authority of the station-master at L. to make a contract for a shipment from O., and that an instruction by the trial judge directing the jury, if they found the above facts upon a preponderance of the evidence, to return a verdict for the plaintiff, was erroneous. Voorhees *v.* Chicago, etc., R. Co. (Iowa). 322.

CARS.

Supply of. See CARRIER.

COMMON LAW.

See ANIMALS; EMINENT DOMAIN.

COMPETITION.

Contract to restrain, construed. Such contract provided for the assignment of "the securities and contracts and control of the South Pennsylvania Railroad enterprise;" that the capital stock assigned should be "adequate to insure the control of the corporation;" that the assignment should be accompanied by the resignation of all the directors and officers of the South Pennsylvania R. Co., and of the American Construction Co. (which had contracted to construct the road), and the substitution of persons to be named by R. *Held*, that the contract was for the "control" of the company, within the language of the constitution, and the claim that it was not so, because the ownership of the stock of a corporation does not give control thereof, was not tenable. Pennsylvania R. Co. *v.* Commonwealth (Pa.). 145.

In determining whether one road is a parallel or competing line in relation to another, traffic contracts with outside roads owned by the former may be taken into consideration. Penn. R. Co. *v.* Commonwealth (Pa.). 145.

It is not necessary that the road should be completed and in operation in order to bring the corporation within the description of the constitution as one "owning, or having under its control, a parallel or competing line." Penn. R. Co. *v.* Commonwealth (Pa.). 145.

Parties to contract to restrain. A contract having been made between R., who was at the same time president of the Pennsylvania R. Co. and of the Pennsylvania Co., and M., representing the South Pennsylvania R. Co., a competitor of the Pennsylvania R. Co., which contract was signed by R. as president of the Pennsylvania Co., by which M. agreed to put the control of his company into the hands of persons to be named by R., the Pennsylvania Co. to give therefor certain bonds, to be guaranteed by the Pennsylvania R. Co.; and it appearing from the evidence that the arrangement was designed for the benefit of the Pennsylvania R. Co.: *held*, that the latter company would be considered as the real party to the transaction; and that it was within the provision of section 4, art. 17, of the Pennsylvania constitution, forbidding one railroad corporation to control any other railroad corporation owning, or having under its control, a parallel or competing line. Penn. R. Co. *v.* Commonwealth (Pa.). 145.

Stockholders have no such right to sell their stock as will interfere with the granting of an injunction to prevent one railroad company from obtaining control of a competing company. Penn. Co. *v.* Commonwealth (Pa.). 145.

The purchase by one railroad company of a controlling interest in another company which competes with roads leased by the first is within the prohibition in Pennsylvania constitution, art. 17, § 4, against one railroad company obtaining control of any competing line, and the transaction will be enjoined although the stock bought is to be taken in the name of a third company; the stock of the latter being largely owned by the first-mentioned company, and the purchase being professedly in the interest of that company, and the consideration therefor being paid by it. Penn. R. Co. *v.* Commonwealth (Pa.). 154.

CONSOLIDATION.

See GRANT.

A State statute enacted that a railroad company should "for its government be entitled to all the powers and privileges, and be subject to all the restrictions and liabilities, imposed" upon another railroad company. *Held*, that the words "for its government" implied for its regulation and control. Tennessee *v.* Whitworth (U. S. S. C.). 211.

CONTINUANCE.

See PRACTICE.

CONSTITUTIONAL LAW.

See COMPETITION.

Amendment of charter. The power of the Constitutional Convention to amend the charter of a corporation was the same as that of the General Assembly. Penna. R. Co. *v.* Duncan (Pa.). 354.

Corporations included in section. The 8th section of the 16th article of the constitution of Pennsylvania includes all corporations falling within the terms of the constitutional amendment of 1857, and also to those falling within the terms of the Act of May 8, 1855, P. L. 423. Pennsylvania R. Co. *v.* Duncan (Pa.). 354.

Double Damage Act, constitutionality of. 293 *n.*

Taking land without compensation. The legislature cannot alter or change the vested rights of the plaintiff in the premises, nor take his land for public use without compensation and without his consent. Coleman *v.* Flint, etc., R. Co. (Mich.). 247.

Tax law as to railway embankments, bridges, etc., *held* unconstitutional. Huntington *v.* Worthen (U. S. S. C.). 230.

Title of statute. Where the subject expressed in the title of a statute is the provision of "a means for the collection of claims for cattle and other stock destroyed by railroad," and the body of the statute declares or creates an absolute liability which did not exist prior to its passage, such new liability is not within the subject expressed in the title, and to this extent the statute is inoperative under section 14 of article 4 of the Constitution. Savannah, etc., R. Co. *v.* Geiger (Fla.). 274.

Vested rights. The Pennsylvania R. Co. had at the adoption of the Constitution of 1874 no vested charter rights which would prevent its becoming subject to the provisions of the 8th section of the 16th article of said constitution. Penna. R. Co. *v.* Duncan (Pa.). 354.

CONSTRUCTION.

Branch road. Authority. The Pennsylvania R. Co. derives its authority to build the branch railroad from the western side of the Schuylkill river to Fifteenth street, Philadelphia, from the Act of May 16, 1857, P. L. 519. It is therefore subject to the Act of May 8, 1855, if not to the amendment of 1857. Penna. R. Co. *v.* Duncan (Pa.). 354.

CONTRACT.

See COMPETITION; PLEADING; POWER OF ATTORNEY; SALE.

Acceptance must comply with offer. 585 *n.*

A contract releasing to a railroad company a right of way of indefinite size and location, through certain land, and agreeing to convey a strip of

CONTRACT—*Continued.*

ground by metes and bounds, by deed in fee-simple, when desired, *held* to be a contract for the conveyance of an easement merely, and not for the fee in the strip. Ottumwa, etc., R. Co. *v.* McWilliams (Iowa). 544.

Charter. Acceptance. The passage of an ordinance by a city granting permission to a railway company to lay down tracks in certain streets, etc., which is accepted, with a resolution of such company that the proper construction of the ordinance is that the permission granted thereby was to operate in the city cars with animal power only, and that the company should not connect with any other railroad on which other power is used, does not create a contract between the people represented by the city, and the railway company, to abandon for all time to come the use of steam within the city as a motive power; but such company may afterwards, on permission of the city, use steam to move its cars in the city. Such ordinance and its acceptance confer a limited right or privilege, but do not prohibit the acquisition of a more enlarged one in the future. McCartney *v.* Chicago, etc., R. Co. (Ill.). 326.

Defective description of land in a contract for conveyance may be cured by putting the vendee into possession. Ottumwa, etc., R. Co. *v.* McWilliams (Iowa). 544.

Promoter's contract not binding on company. Munson *v.* Syracuse, etc., R. Co. (N. Y.). 377.

Reorganization contract. A contract by which the bondholders of an insolvent railroad company agree to foreclose a mortgage on its property, to buy the property at the mortgage sale, and to transfer it to another company of which one of the bondholders of the insolvent road was a director, in consideration of the transfer of certain bonds of the proposed new company, *held*, not to be such a contract as is sanctioned by chapter 710, Laws N. Y. 1873, relating to the reorganization of an existing railroad. Munson *v.* Syracuse, etc., R. Co. (N. Y.). 377.

Right of way. Construction. Description. A railroad company having surveyed two lines, near to each other, across defendant's land, and having afterwards constructed its road on one of them, *held*, that a contract made after the surveys, but before the construction of the road, by which the owner of the land agreed to convey to the company a right of way through his land, was sufficiently certain to be specifically enforced, although it did not fix the exact location or width of the right of way, but merely described it as a right of way of necessary width, not less than 50 feet, through defendant's land, describing such land. Nor is such description open to objection on the ground of uncertainty because using "Tp." as an abbreviation for township, and "R." for range, or because not stating whether the range is east or west, the county being given, and that fixing it. Ottumwa, etc., R. Co. *v.* McWilliams (Iowa). 544.

Right of way. Construction. A written agreement between a railroad company and the owners of certain town lots through which the track of the railroad had been laid without any legal proceedings to condemn the land, by which the company agreed to pay a specified sum of money, and to do certain grading and other work on the adjacent lots of the owners, who, "in return," agreed to "give" the company the right of way through the lands, vests in the railroad company only an equitable title, leaving the legal title in the owners. Hooper *v.* Columbus, etc., R. Co. (Ala.). 540.

Specific performance of such contract should not be refused because the value of the land taken by the company far exceeds the sum agreed to be paid, the building of the road being named in the contract as part of the consideration. Ottumwa, etc., R. Co. *v.* McWilliams (Iowa). 544.

Voidable, where made by company with its director. Munson *v.* Syracuse, etc., R. Co. (N. Y.). 377.

Whether contract to convey is a lease, an option to purchase, or a deed. 579 *n.*

CORPORATIONS.

Dissolution of. 451 *n.*

Existence. Legislative recognition. An act of the Illinois legislature, in 1865, confirming an ordinance of the city of Chicago granting permission to a railway company, chartered by special act, to lay a track on and over certain streets from a certain point to the city limits, and authorizing the company to build a bridge over the Chicago river, the giving of which privileges had been accepted, is held to be a legislative recognition that the company then had a corporate existence, and had taken corporate action in the way of carrying out the purpose of its charter. McCartney *v.* Chicago, etc., R. Co. (Ill.). 326.

Pennsylvania R. Co. accepted as part of its charter the Act of April 4, 1868, and so became subject to the constitutional amendment of 1857, and as a consequence to the legislative power of the General Assembly. Penna. R. Co. *v.* Duncan (Pa.). 354.

COSTS.

When the costs of a trial are rendered useless by a continuance, and the continuance is rendered necessary by plaintiff's failure to introduce his evidence at the proper time, the costs are properly taxed to him. Voorhees *v.* Chicago, etc., R. Co. (Iowa). 323.

COUPONS.

An action lies by the holder of coupons or interest warrants detached from corporation bonds payable to bearer. Phila., etc., R. Co. *v.* Fidelity Ins. Co. (Pa.). 404.

Interest is recoverable upon such coupons or interest warrants from the time the same matured. Phila., etc., R. Co. *v.* Fidelity Ins. Co. (Pa.). 404.

Such an action is not limited to coupons which matured within six years prior to suit brought. Phila., etc., R. Co. *v.* Fidelity Ins. Co. (Pa.). 404.

The right to bring such an action is not affected by the fact that the said bonds were secured by corporation mortgage executed pursuant to the Act of January 18, 1865. Phila., etc., R. Co. *v.* Fidelity Ins. Co. (Pa.) 404.

Action by holder. Jurisdiction. A., the owner of certain coupons and scrip certificates of unpaid interest owing by a foreign railroad corporation upon bonds secured by an income mortgage, in behalf of himself and other owners of coupons and certificates, filed a bill in the circuit court against the railroad company and the Union Trust Co., a citizen of the same State as himself, which was the trustee named in the income mortgage, to compel an accounting, and for an injunction against the appropriation of the earnings of the railroad company contrary to the rights of the income bondholders, and for a decree for the payment of the income applicable to the interest, averring that the trust company was made defendant because it asserted that no duty was imposed on it in respect to the matters involved in the suit, and had refused to bring suit when requested to do so. *Held*, that the circuit court had jurisdiction. Barry *v.* Mo., Kans. & Tex. R. Co. (U. S. C. C.). 384.

Holder of, may sue. The holder of overdue interest coupons and interest warrants, whether attached to or severed from bonds issued by a railroad corporation payable to bearer, may maintain an action thereon against the corporation, and may recover interest on the amount of said coupons and warrants from the time they become due and payable. Phila. & Read. R. Co. *v.* Smith (Pa.). 400.

COURTS.

Jurisdiction of justice of the peace in action for killing stock. 294 *n.*

CROSSING.

Authorities collated upon. 434 *n. et seq.*
Degree of care required from railway at. 436.
Nonsuit. A railroad line crossed a public footpath on the level, the approaches to the crossing being guarded by hand-gates. A watchman who was employed by the railway company to take charge of the gates and crossing during the day was withdrawn at night. The dead body of a man was found on the line near the level crossing at night, the man having been killed by a train which carried the usual head-lights but did not whistle or otherwise give warning of its approach. No evidence was given of the circumstance under which the deceased got on to the line. An action on the ground of negligence having been brought by the administratrix of the deceased, the jury found a verdict for the plaintiff. *Held*, affirming the decision of the court of appeal, that even assuming (but without deciding) that there was evidence of negligence on the part of the company, yet there was no evidence to connect such negligence with the accident; that there was therefore no case to go to the jury, and that the railway company were not liable. Wakelin *v.* London & S. W. Ry. Co. (Eng.). 425.
Obligation to repair. 438 *n.*, 439 *n.*
Person upon, not a trespasser. 434 *n.*
Speed at, in violation of ordinance. 439 *n.*
Speed. Manner of operation. In an action for damages for the alleged negligent killing of plaintiff's intestate by defendant's cars at a railroad crossing, *held*, that when the circumstances connected with the accident in this case were shown, including the speed of the train and the manner in which it was operated, it was for the jury to say whether, with regard to the safety of travellers, the rate of speed and management of the train was reasonably prudent. Bolinger *v.* St. Paul, etc., R. Co. (Minn.). 408.
Watchman. The accident occurring on a public thoroughfare in a city, it was also for the jury to determine whether the presence of a watchman or other precautions not taken were reasonably necessary for the safety of the public. Bolinger *v.* St. Paul, etc., R. Co. (Minn.). 408.

DAMAGES.

See GRANT.

Consequential. Embankment. 521 *n.*
Double Damage Act, constitutionality of. 293 *n.*
Elements of. 564 *n.*
It appearing that the deceased left a wife and children surviving, and was a strong, healthy man, in middle life, accustomed to earn good wages, the damages allowed by the jury to the amount of $5000 were not so clearly excessive and unreasonable as to warrant this court in setting aside the verdict for such cause. Bolinger *v.* St. Paul, etc., R. Co. (Minn.). 408.

DEDICATION.

See EASEMENT; HIGHWAY.

Reservation. In the plat of an addition to a city no rights can be reserved by the proprietors inconsistent with the purpose of the dedication, or which would modify it, so far as purchasers of lots and the public are concerned. Redinger *v.* Marquette, etc., R. Co. (Mich.). 611.

DEED.

See GRANT; LAND GRANT.

DEMAND.

See STATIONS.

DISCRIMINATION.

See CARRIER; INJUNCTION; INTERSTATE COMMERCE ACT; INTERSTATE COMMERCE COMMISSION; MANDAMUS; RATES.

American cases upon the circumstances and conditions under which competitive transportation is conducted. 78 *n.*

A railway company cannot legally discriminate in favor of one competitive shipper against another competitive shipper, shipping the same class of freight between the same competitive points, unless there be some substantial difference in the cost of the service to the company. 75 *n.*

A railway company cannot legally discriminate in favor of one local shipper against another local shipper simply because the former has agreed to ship the whole or some indefinite amount of his traffic over the defendant's line, while the other has not. 74 *n.*

A railway company cannot legally discriminate in favor of one local shipper against another local shipper merely to prevent a threatened competition at a point where no actual competition exists. 73 *n.*

A railway company cannot legally discriminate in favor of a traffic because of its origin or antecedents. 69 *n.*

A railway company cannot legally discriminate in favor of a traffic because of the ultimate use to which it is to be put after the railway transportation has been completed and ended. 70 *n.*

A railway company has no right to discriminate between different local shippers by depriving one of them of a natural advantage which he may have over the other by reason of location, distance, etc. 71 *n.*

A railway company has no right to discriminate against an individual on account of his occupation or personal status. 66 *n.*

DIVIDENDS.

Defendant being embarrassed by a large floating indebtedness, for the immediate payment of which it had no means, passed into the hands of a receiver, and for the purpose of raising funds to pay said indebtedness was authorized by the legislature to issue not exceeding fifty thousand shares of preferred stock. It issued of said preferred stock nineteen thousand shares, which were sold for cash, and dividends on said stock, to the amount of seven per cent annually, were to be paid thereon from the net earnings of the company and to take priority over dividends on the ordinary stock. A general statute provided that no corporation should declare any dividend while its capital was impaired. *Held*, that a dividend on the preferred stock could be made out of the "net earnings" since the issue of said stock, notwithstanding the fact that a large deficiency existed at the time of issuing said preferred stock. Cotting *v.* New York, etc., R. Co. (Conn.). 871.

EASEMENT.

See CONTRACT.

Dedication. The facts, that a road was never opened and worked by the authorities inside the line of plaintiff's fence, but outside of it only; that the public use and travel have also been outside of such fence; that the plaintiff for over thirty years has cultivated and held the premises as his private property, subject to no easement of the public, are sufficient to rebut any presumption of any donation or dedication of

EASEMENT—*Continued.*

the same to the public, and conclusive evidence of an intention to restrict the road to the space outside of his fence. Coleman *v.* Flint, etc., R. Co. (Mich.) 247.

Dedication to public, subject to railway, use. Suspension of public during railway use. Conveyance of grantor's interest in highway. 580 *n.*

Reservation of. 579 *n.*

The right of way for a railroad is an easement—an interest in the freehold; and it can only exist in grant or by prescription. East Alabama R. Co. *v.* Tennessee, etc., R. Co. (Ala.). 363.

EJECTMENT.

A railroad company having constructed its road through plaintiff's lands, without objection by him, under an executory contract for the purchase of the right of way, cannot defeat an action of ejectment founded on his legal title, by proof of facts which would constitute an equitable estoppel. Hooper *v.* Columbus, etc., R. Co. (Ala.). 540.

In ejectment, or the statutory action in the nature of ejectment, the legal title must prevail, and the court cannot take cognizance of an equitable title. Hooper *v.* Columbus, etc., R. Co. (Ala.). 540.

Estoppel. The defendant corporation in this case, having acquired its possession and title to said railroad property from the corporation which bought from the plaintiff, is equally bound by the estoppel; but this estoppel only extends to the five miles of road between Attala and Gadsden, which had been surveyed, located, cleared and graded at the time said sale and purchase was made. As to that portion of the road which lies between "Christopher's Cut" and the Coosa river, a gap of about one mile, the evidence does not show that plaintiff, at the time the said contract of sale was made, had acquired the right of way, or had definitely surveyed and located the road, or was in possession by any visible marks of ownership; and even if the purchasing company were estopped from denying that it acquired this portion of the road under its contract of purchase from plaintiff (which is not decided), the estoppel would not be operative against parties claiming under a mortgage executed by the purchasing company before the contract was made, but after said company had located and graded this part of the road as a portion of its own line. East Ala. R. Co. *v.* Tennessee, etc., R. Co. (Ala.). 363.

Recovery of road. Estoppel. On the former appeal in this case (75 Ala. 516–30) it was decided that the plaintiff corporation had established its right to recover so much of the railroad, with right of way and superstructure, as it had located, cleared, and graded at the time of its conditional sale and transfer to the purchasing corporation from which the defendant derived title; that said purchasing corporation, acquiring its possession and rights under said conditional sale and conveyance, was estopped from denying that plaintiff had ever procured the right of way from the owners of the freehold; that this estoppel was equally binding on the defendant, a derivative purchaser from said purchasing corporation; and that neither the subsequent bankruptcy of the purchasing corporation, nor the sale of the road under the proceedings in bankruptcy, nor the foreclosure and sale of the property under the mortgage in trust for the bondholders, impaired plaintiff's right of recovery. The court adheres to these conclusions as then announced, without re-examination of the questions involved. East Alabama R. Co. *v.* Tennessee, etc., R. Co. (Ala.). 363.

EMINENT DOMAIN.

See CONSTITUTIONAL LAW; GRANT; PLEADING.

A common-law action can be maintained against a corporation for an injury done to private property in the exercise of the right of eminent domain. Penna. R. Co. *v.* Duncan (Pa.). 354.

Compensation. Where a right of way is condemned for public use over a tract of land, the owner will be entitled to compensation not only for the value of the land taken, but also for all damages to the residue of the tract, past, present and future, which the public use may thereafter reasonably produce. Chicago, etc., R. Co. *v.* Smith (Ill.). 558.

EQUITY.

See STATIONS.

EVIDENCE.

See FIRE; INTERSTATE COMMERCE COMMISSION.

Cattle-guards out of repair. 295 *n.*

Circumstances showing place where injury to animals occurred. 295 *n.*

Confined to issue. 130 *n.*

Contributory negligence proved. Effect. Where, in an action founded on the negligence of defendant, plaintiff's evidence shows that his own negligence directly contributed to produce the injury, he disproves the case alleged and cannot recover. Milburn *v.* Kansas City, etc., R. Co. (Mo.). 244.

Conversations between employees. A conversation between two employees of a railroad company concerning a past transaction is incompetent evidence, as against the railroad company, to prove such transaction. Union Pac. R. Co. *v.* Fray (Kan.). 309.

Conversations between employees inadmissible. 316 *n.*

Declarations of agent. Before the declarations of an alleged agent can be admitted in evidence against his principal, some evidence that he was authorized to act for his principal in relation to the matter in hand must be introduced. Drake *v.* Chicago, etc., R. Co. (Iowa). 514.

Excess of speed. 294 *n.*

Growth of bushes as evidence of negligence. 294 *n.*

Jury's duty as to. A jury should not, in the trial of an action, reject the evidence of any witness simply because it is in conflict with the evidence of other witnesses; but they should determine, in the light of the story told, and all the circumstances, the very truth of the proposition, whatever it may be. Drake *v.* Chicago, etc., R. Co. (Iowa). 515.

Killing stock. Evidence of employees of train. Weight. 294 *n.*

Malicious prosecution. Reasonable cause. In an action for malicious prosecution by a railroad company for causing the delay of a train by reason of the arrest of the engineer in an action for damages for killing a heifer on the track which the company had failed to fence, the defendant, as tending to show a cause of action, offered to prove that plaintiff had not performed its statutory duty to fence, and that he had been injured thereby. *Held*, admissible. St. Johnsbury, etc., R. Co. *v.* Hunt (Vt.). 234.

Place of entry upon track. It need not be shown by direct evidence where the animal strayed upon the railroad track. Proof that it was killed at a point where there was no fence, but where the company was in duty bound to fence, is sufficient to take the case to the jury. Lepp *v.* St. Louis, etc., R. Co. (Mo.). 242.

Place of killing animal. In an action against a railroad company for double damages for killing stock, proof that the animal was killed at a point a

EVIDENCE—*Continued.*

quarter of a mile from the depot, beyond the switch limits, where the road was fenced on one side, but not on the other, is *prima facie* sufficient to show that the killing did not occur within the limits of an incorporated town, or at a public crossing. Lepp *v.* St. Louis, etc., R. Co. (Mo.). 242.

Statements of broker. In an action against a carrier to recover damages for loss of market, evidence of the statements of plaintiff's broker is hearsay, and inadmissible. Voorhees *v.* Chicago, etc., R. Co. (Iowa). 822.

EXECUTION.

The holder of a decree against an insolvent railway corporation who, as director of a new corporation, with full knowledge, consents to the subsequent acceptance of a deed from a receiver to it, free from all encumbrances, under the statute, and votes to execute a mortgage for the security of bondholders, which shall be a first lien, *held*, not entitled, on petition, to execution and sale of land of the company, with priority. Freehold, etc., R. Co. *v.* Hodgson (N. J.). 898.

FACILITIES.

See STATIONS.

FENCE.

As to failure to fence and pleadings, evidence, etc., in actions for injuries thereby caused, see 296 *n.*, 297 *n.*

Duty. Leaving jog in. Where a railroad crosses a highway diagonally, and the company, in fencing its right of way, leaves a jog or space between the termination of its fence and the fence of the adjacent owner, it violates its duty in fencing its right of way; and where the horse of plaintiff escaped by reason of a defective fencing of that space and went upon the track of defendant, where it was killed by collision with its cars, the company is liable. Coleman *v.* Flint, etc., R. Co. (Mich.). 247.

Duty to. 293 *n.*

Gates: how to be made. 295 *n.*

Grounds held not a part of yard. 293 *n.*

In cities. A railroad corporation has not the right to fence its track in cities and towns, where it is intersected by streets and alleys, notwithstanding the language of the statute (Code Iowa, §§ 1268, 1288), requiring fencing where the road passes through unimproved land, or where the same person owns the land on both sides of the track. Blanford *v.* Minneapolis, etc., R. Co. (Iowa). 289.

Instruction as to. 294 *n.*

Stations and yards: no duty to fence. 293 *n.*

Stock breaking down. 295 *n.*

FIRE.

See PRESUMPTION.

Care to be used. In an action for damages against a railroad company for a fire occasioned by sparks from one of its engines, it is misleading to charge the jury simply that the railroad company was bound to use the reasonable care and diligence of an ordinarily prudent man, in preventing the escape of fire, and in keeping its right of way clear of combustible

FIRE—*Continued.*

material, unless accompanied by an explanation that the care required is the ordinary care of an expert engineer or railroad servant. Diamond v. Northern Pac. R. Co. (Mont.). 117.

Duty of jury. Where there is a conflict of evidence as to whether the fire producing the damages complained of was caused by an engine upon defendant's road which was fully protected in respect to fire-screen, or by another engine passing at about the same time with a defective fire-screen, it becomes a question of fact for the jury to determine which engine caused the fire. Seeley v. N. Y. Cent., etc., R. Co. (N. Y.). 171.

Duty to clear right of way. Under Laws Mont. 1881, p. 71, § 7, enacting that railroads running through the Territory shall keep their right of way free from dead grass, weeds, or any dangerous or combustible material, it is as much the duty of a railroad company to so keep its right of way as it is to use proper means to prevent the emission of sparks of fire, and such law does not trench upon the chartered right, under act of Congress, of such a railroad company. Diamond v. Northern Pac. R. Co. (Mont.), 118.

Evidence as to. 128 *n*.

Evidence as to kind of machinery used. Where it is shown by sufficient uncontradicted evidence that the railroad company negligently permitted dry grass and other combustible materials to accumulate on its road and right of way, and that fire was communicated thereto from its locomotives in some manner, evidence offered by the railroad to show the kind of stack, fire-box, and ash-pan in use on its locomotives was properly excluded. Indiana, etc., R. Co. v. Overman (Ind.). 162.

Instruction as to escape of fire. The request of the defendant that the jury be instructed to find for it if the fire escaped from the smoke-stack, instead of the fire-box or ash-pan of the engine, *held* properly refused, although the place of the escape of the fire was alleged in the petition to have been the ash-pan and fire-box. The evidence on the trial related to the locomotive engine, in providing and operating it, and whether the fire escaped from it through the ash-pan or through the smoke-stack was immaterial, unless the defendant was prejudiced by the supposed variance, which was not the case. Wise v. Joplin R. Co. (Mo.). 164.

Insurance no defence. The plaintiff's buildings, alleged to have been destroyed by fire negligently communicated by one of defendant's engines, were insured at the time, and after the commencement of this action the amount for which they were insured was received by plaintiff. *Held*, that the action might properly be continued and prosecuted to judgment by plaintiff. Nichols v. Chicago, etc., R. Co. (Minn.). 175.

It is not negligence *per se* in a railway company to allow grass and weeds to grow and accumulate upon its right of way, in the absence of a statute forbidding it. Nor is the fact that sparks are permitted to escape from a moving engine negligence *per se*. In the operation of trains, etc., such companies are required to exercise that degree of prudence which, under like circumstances, a reasonably cautious person would exercise. Texas, etc., R. Co. v. Medaris (Tex.). 159.

Leaving combustibles on right of way is negligent. 129 *n*.

Liability of railway. Where a railroad company sets fire to the dry grass and other combustible materials which it has negligently suffered to accumulate on its track and right of way, and, without fault of the adjoining land-owner, permits such fire to escape to his lands and burn and destroy his property, the railroad company will be liable for the damages, whether such fire was started negligently or otherwise. Indiana, etc., R. Co. v. Overman (Ind.). 162.

Lumber near track burned. 181 *n*.

Negligence. Proof. The owner of personal property cannot recover for damages thereto by fire, communicated by a locomotive, from the railroad company, except upon proof of negligence on the part of the com-

FIRE—*Continued.*

pany, and that the fire was caused by such negligence. Lowney *v.* New Brunswick R. Co. (Me.). 116.

Obligation of railway company to furnish suitable apparatus to prevent. 181 *n.*

Other fires on same day, admitting evidence of. 129 *n.*

Petition. Averments. The petition need only aver the substantive facts that the fire was negligently permitted to escape and burn the plaintiff's property. Under such averments the plaintiff can show the negligence of the railroad in providing safe engines, and also in operating them. Wise *v.* Joplin R. Co. (Mo.). 164.

Primâ facie case of negligence as to. 129 *n.*

Primâ facie case. Proof of the fact of fire escaping from a passing engine and burning the property of another makes a *prima facie* case of negligence against the railroad which provides and operates the engine. Wise *v.* Joplin R. Co. (Mo.). 164.

Prima facie case of negligence. A *prima facie* case of negligence on the part of a railway company to provide suitable mechanical contrivances to prevent the escape of fire is made out when it is shown that fire escaped from such engine and caused the fire in question, thus throwing the burden of proof on the defendant to establish that, notwithstanding the fire did escape, the best mechanical contrivances were supplied by defendant to prevent such an occurrence. Miller *v.* St. Louis, etc., R. Co. (Mo.) 254.

Proof of scattering of fire. In actions for damages against a railroad company resulting from sparks or fire emitted or scattered by one of the defendant's engines, it is competent for plaintiff to show that, about the time when the fire took place, fire was scattered by an engine or engines of defendant's, without predicating such engine to be the one which occasioned the fire in question. Diamond *v.* Northern Pac. R. Co. (Mont.). 118.

Right to burn grass. The railroad company had the right to set fire to and burn the dry grass and other combustible material on its right of way; but it is bound at its peril to keep such fire within its own limits. Indiana, etc., R. Co. *v.* Overman (Ind.). 161.

Stacking grain near track. Negligence. 130 *n.*

Storing property near track. Acquisition of land for the purposes of a railroad does not embarrass the right of the owner of adjoining lands not taken in the freest use of them in any lawful business, nor expose him to be charged with contributive negligence if his property of an inflammable nature, necessarily and carefully used in the course of such business, is set afire by sparks from a defective or unskilfully managed locomotive. Kalbfleisch *v.* Long Island R. Co. (N. Y.). 179.

Use of wood for fuel. R. owned a barn situated about two hundred feet from the New Brunswick R. Co.'s line, and such barn was destroyed by fire, caused, as was alleged, by sparks from the defendant's engine. An action was brought to recover damages for the loss of said barn and its contents. On the trial it appeared that the fuel used by the company over this line was wood, and evidence was given to the effect that coal was less apt to throw out sparks. It also appeared that at the place where the fire occurred there was a heavy up-grade, necessitating a full head of steam, and therefore increasing the danger to surrounding property. The jury found that the defendants did not use reasonable care in running the engine, but in what the want of such care consisted did not appear by their finding. *Held*, reversing the judgment of the court below, that the company were under no obligation to use coal for fuel, and the use of wood was not in itself evidence of negligence; that the finding of the jury on the question of negligence was not satisfactory, and that therefore there should be a new trial. New Brunswick R. Co. *v.* Robinson (Can.). 182.

FORFEITURE.

By non- or mis-user. Abandonment of road. The duty of a railroad corporation to maintain and operate its road is a public duty, and the chief end and object of its creation and existence, and the condition and consideration upon which it receives its grants and franchises from the State; and the suspension of such duties is a suspension of its lawful business within the meaning of the statute, and a cause for declaring a forfeiture, though the corporation also possess, and continue to exercise, other franchises, subordinate and secondary to its principal franchises and business, unless such forfeiture is waived, or the right to continue to exist as a corporation after such suspension of its business is sanctioned by the State. State *v.* Minn. Cent. R. Co. (Minn.). 440.

By non- or mis-user. 452 *n.*

Forfeiture mandatory. Where, in a proceeding by the attorney-general in behalf of the State for the dissolution of a corporation under the statute, the facts clearly bring the case within its terms, it is mandatory upon the court to declare a forfeiture. State *v.* Minn. Cent. R. Co. (Minn.). 440.

Generally. 451 *n.*

Judicial declaration. The statute (Gen. St. Minn. 1878, c. 76, § 11) provides that the suspension of its lawful business by a railroad company for one year shall be a ground of forfeiture "of its privileges and franchises acquired under the laws of this State. But the corporation is not to be deemed dissolved until such forfeiture is judicially ascertained and declared. State *v.* Minn. Cent. R. Co. (Minn.). 440.

Right of. It is a tacit condition, annexed to or implied in the charter of every private corporation, that the government may resume its corporate franchises for a misuser or non-user thereof. State *v.* Minn. Cent. R. Co. (Minn.). 440.

What is not. 452 *n.*

FRANCHISE.

See FORFEITURE.

Confirmation by legislature. Were it a matter of doubt whether a railway company may, under its charter, lay its track within the limits of a city, an act of the legislature confirming an ordinance of the city giving the company permission to lay its railway track in certain streets of the city, and declaring that the ordinance shall be held to confer on the company power and authority to construct and operate its road in the streets and over the bridge mentioned therein, until the same shall be altered, changed or amended by the common council, with the assent of the company, will remove the doubt and be regarded as a recognition of the right. McCartney *v.* Chicago, etc., R. Co. (Ill.). 326.

Exemption from taxation is a. The right to hold exempt from taxation land granted to a railroad corporation in aid of its principal enterprise is a franchise, but ancillary and subordinate; and the right to exercise such franchise, and to continue its corporate existence for such purposes only, cannot lawfully survive after a sale of its railroad, and the abandonment of its principal business as a railroad corporation, unless by the authority of the legislature expressed or clearly implied. The rights of the State are not lost by delay merely, nor can they be waived by its executive officers. State *v.* Minn. Cent. R. Co. (Minn.). 440.

Horse or steam railway. Authority in the charter of a railway company to build either a horse railroad or a steam railroad within a city confers a continuing option to use either steam or animal power, or both, upon its road, or any part of it, which might be exercised from time to time.

FRANCHISE—*Continued.*

Under it the use of either motive power may be changed and the other substituted, as the company may see fit. McCartney *v.* Chicago, etc., R. Co. (Ill.). 326.

GRANT.

See CONTRACT; HIGHWAY; HOMESTEAD; LAND GRANT; POWER OF ATTORNEY; WATERS.

Conditional conveyances of right of way. 581 *n.*

Consideration. Damages. Where a person conveys a right of way over his land, it will be conclusively presumed that all the damages to the balance of the land, past, present and future, were included in the consideration paid him for his conveyance, the same as an assessment of damages on a condemnation would be presumed to embrace. Chicago, etc., R. Co. *v.* Smith (Ill.). 558.

Construction as to use of waters. All grants of the right of way over premises must be construed reasonably, and in the light of surrounding circumstances. Where the undisturbed and exclusive use of certain ground was necessary and essential to the best interests of the owners, as was such use of the canal itself, the proper construction of the grant of a right of way is that, in whatever manner defendant make suse of its right, it must in no way interfere with complainant's free, unobstructed, and exclusive use of both the canal and the adjacent premises, except for the purposes mentioned in the grant. Newaygo Mfg. Co. *v.* Chicago, etc., R. Co. (Mich.). 505.

Implications. In a grant of land, all which is necessary to the beneficial enjoyment of the thing granted, and which is in the power of the grantor to convey, will pass, unless expressly reserved. Redinger *v.* Marquette, etc., R. Co. (Mich.). 611.

Implications of. Where anything is granted, all the means to attain it, and all the fruits and effects of it, are granted also, by presumption of law, and will pass inclusive, together with the thing, by the grant of the thing itself, without the words *cum pertinentiis*, and any like words. Chicago, etc., R. Co. *v.* Smith (Ill.). 558.

Reservations. Construction. The general method of construing provisions in deeds reserving rights and easements is to give them the force which the deed evidently intended they should have. Redinger *v.* Marquette, etc., R. Co. (Mich.). 611.

Right to use property granted is implied. A mere conveyance of part of a tract of land may not give the grantee the right to make any use of the part granted which will injuriously affect the remaining portion; but when the grant is expressed to be for a particular use, neither the grantor nor one claiming under him can object to such use, and recover damages resulting therefrom. Chicago, etc., R. Co. *v.* Smith (Ill.). 558.

Use of property after consolidation. The grant of a right of way over his land by a party, to a railway company, "for all uses and purposes, or in any way connected with the construction, preservation, occupation and enjoyment of said railroad," is broad enough to embrace all uses for railroad purposes, however much increased, and by any other companies authorized by law. If such grantee company consolidates, according to law, with other companies, and thereby greatly increases the use of the right of way, the owner, or his grantee, of adjoining lots cannot recover damages caused by such increased use. Chicago, etc., R. Co. *v.* Smith (Ill.). 558.

Bridge. Negligence. Where the borough was negligent in causing or per-

HIGHWAY.

mitting the roadway under the bridge to be filled up till the space under it was too small to satisfy the requirements of common convenience and necessity, the railroad company is not liable for the damages received by one coming in collision with the bridge by reason of its height being thus practically reduced. Gray *v.* New York, etc., R. Co. (Conn.). 486.

Compensation for use. A mining company owned certain land near a city, which it platted, reserving "the exclusive right to lay a plank or railroad track through and across any of the streets reserved on the map." The street down which it seems they intended to run their road was laid out much wider than the rest, and was partially occupied for such purposes. Subsequently they assigned all their rights to a railroad company, which proceeded to build four tracks down this street, after having gained the city's permission so to do. A property-owner along this street obtained an injunction against the company, and upon appeal it was held that the company had no right to blockade the streets without compensating property-owners, and that the foregoing reservation in the plat did not give them the privilege to destroy the usefulness of private property. Redinger *v.* Marquette, etc., R. Co. (Mich.). 611.

Consent to build road upon. A railway company cannot, under the statute (G. S. 1865, p. 333; R. S. 1879, sec. 765), construct its road along or upon a public highway, except with the consent of the county court; and if it does so without such consent, a court of equity will interfere and grant the county appropriate relief. State *v.* St. Louis, etc., R. Co. (Mo.). 607.

Control. Reservation. Where a city possesses certain rights and powers over property added to its territory, and the streets therein, such rights cannot be controlled by reservations in the plat which are against public policy. Redinger *v.* Marquette, etc., R. Co. (Mich.). 611.

Interference with public use. It is the duty of a railroad company, without a statutory requirement to that effect, to so construct its road as not to prevent the public from using its highways, and this duty is a continuing one. State *v.* Hannibal, etc., R. Co. (Mo.). 604.

It is not competent for a city to authorize such use of a street, dedicated as a street, as will destroy it as a thoroughfare for the public use. Dubach *v.* Hannibal, etc., R. Co. (Mo.). 609

Lot-owner's rights. The purchasers of lots fronting upon a street have the right to have the street kept open for the usual and customary methods of travel, and the grantors cannot thereafter withdraw or change such public spaces to the detriment of the grantees. Redinger *v.* Marquette, R. Co. (Mich.). etc., 611.

Mandamus is an appropriate remedy to compel the restoration of a highway, by a railway, to its proper condition, and, in this respect, to the company to perform its charter duties. State *v.* Hannibal, etc., R. Co. (Mo.). 604.

Mandamus. It is sufficient for the relators in such proceeding to show that they are citizens and thus interested in the performance of a public duty. State *v.* Hannibal, etc., R. Co. (Mo.). 604.

Nuisance. Injunction. When the laying of a proposed railroad track would be a public nuisance, but an individual would sustain special damage as the owner of an abutting lot upon which he conducted his business, such individual has the right to institute suit for an injunction. Dubach *v.* Hannibal, etc., R. Co. (Mo.). 609.

Repair of, by railway company. An ordinance of a city giving the privilege of using its street for a horse railway, and which contained a provision requiring the railway company to keep and maintain the space between its rails and for two feet on either side of its track, and all street crossings along its line, in good repair, does not impose on such company an obligation to re-construct the street. State *v.* Corrigan, etc., R. Co. (Mo.). 591.

Repair. Ordinance. An ordinance of a city requiring a horse railway to repair the street between the rails and on the sides of such railway is not

HIGHWAY—*Continued.*

invalid as being a surrender by the city of its corporate power over its streets. State *v.* Corrigan, etc., R. Co. (Mo.). 591.

Repair. Repaving. An obligation to repair a street is not an obligation to construct thereon a new pavement. State *v.* Corrigan, etc., R. Co. (Mo.). 591.

Reservation, in a plat of an addition to a city, of the right to occupy streets for railroad purposes, is only a reservation as against the city, and cannot be used to oppress private property-owners. Redinger *v.* Marquette, etc., R. Co. (Mich.). 611.

Restoration. Defence. In a *mandamus* proceeding to compel a railway company to so construct its road as not to prevent the public from using a specified part of a highway, it is no defence that the track had formerly been placed in the highway by another railway company. Such fact is no justification of the continuance of the obstruction of the highway by defendant to the entire exclusion of the public. State *v.* Hannibal, etc., R. Co. (Mo.). 604.

Restraining use of. Laches. The profile and map of the route of the defendant company through the county was filed, as required by statute. (G. S.1865, p. 337), in the office of the clerk of the county court in April, 1878, and the present action to restrain the defendant from using the highway was instituted in January, 1882. *Held*, there was no such delay on the part of the county as to preclude it from asserting its rights against the company. State *v.* St. Louis, etc., R. Co. (Mo.). 607.

Space between highway and bridge over it. Where a railroad company built a bridge over a highway, and was itself guilty of no negligence, and the bridge was built upon such plans and at such height as the borough required, the company is not bound to prevent the highway from being raised, nor to preserve the original space between it and the bridge. Gray *v.* New York, etc., R. Co. (Conn.). 486.

Street. Repair. A city, by a subsequent ordinance, cannot impose on the railway company, without its consent, an additional obligation to pave the treet. Such subsequent ordinance cannot be sustained on the ground that it is a proper exercise of the police power of the city. State *v.* Corrigan, etc., R. Co. (Mo.). 581.

Track in street: control over, by city. Where a city has granted to a corporation the privilege to construct and maintain a street railway in the streets and alleys of the city, the grant providing that the track of the railway shall be made to conform to the established grade of the streets, but containing no provisions as to the rail which shall be used on the track, or the gauge upon which it shall be constructed, the city, under its ordinary powers, has no power to regulate the manner in which the track shall be constructed, and equity will not interfere to restrain the street railway corporation, at the suit of the city, from constructing its line with a rail and gauge obnoxious to the city authorities. Waterloo *v.* Waterloo S. R. Co. (Iowa.). 601.

Use for railways. The usual powers conferred by its charter on a municipal corporation over its streets are sufficient to authorize it to permit their use for horse railways; *aliter* as to railways operated by steam. State *v.* Corrigan, etc., R. Co. (Mo.). 591.

Whether title to one half of street passes by deed of abutting lot. 580 *n.*

HOMESTEAD.

Conveyance. Joinder of wife. A railroad running through a 40-acre homestead tract, through a cut the edge of which is 95 feet from the dwelling-house, does not destroy the substantial enjoyment of the homestead as such; and therefore a conveyance of a right of way to a railroad company for such purpose is not a conveyance or incumbrance of the homestead, within Code Iowa, § 1990, and may be made by the husband without his wife joining. Ottumwa, etc., R. Co. *v.* McWilliams (Iowa). 544.

Rights of homesteader against railway. 475 *n.*

HUSBAND AND WIFE.

See HOMESTEAD.

In Texas the husband may sue alone for the recovery of the wife's separate property, and recover damages occasioned by injury to such property. Texas, etc., R. Co. *v.* Medaris (Tex.). 159.

INJUNCTION.

See COMPETITION.

To restrain railways from discrimination, etc. 54 *n.*

INSTRUCTION.

An instruction which assumes facts alleged therein to have been proven is erroneous and is properly refused. Louisville, etc., R. Co. *v.* Yniestra (Fla.). 298.

It is not error to refuse special charges which are embodied in the general charge. Texas, etc., R. Co. *v.* Medaris (Tex.). 159.

There is no error in giving as instructions abstract legal propositions which correctly state the law, where there is evidence to which the instructions as given are applicable. Hill *v.* Cincinnati, etc., R. Co. (Ind.). 502.

The submission of a question of law to jury is no ground of exception if they decide it aright. Minneapolis, etc., R. Co. *v.* Columbus R. M. Co. (U. S. S. C.). 583.

Where a petition states as a cause of action that a defendant had failed to construct and keep in repair sufficient and suitable drains, it is not error for the court to instruct the jury, in the trial of the action, on the theory that a ditch had been constructed. Drake *v.* Chicago, etc., R. Co. (Iowa). 514.

Where the court, in its charge, has fully stated the issues in an action to the jury, a remark that "they are referred to the pleadings for the issues" is not prejudicial. Drake *v.* Chicago, etc., R. Co. (Iowa). 514.

INTEREST.

See ACCOUNTS; COUPONS.

Articles in mortgage relating to default in payment of interest construed 408 *n.*

INTERSTATE COMMERCE ACT

See CARRIERS; INTERSTATE COMMERCE COMMISSION.

Construction. The phrase "under substantially similar circumstances and conditions" in the fourth section is used in the same sense as in the second section; and under the qualified form of the prohibition in the fourth section, carriers are required to judge in the first instance with regard to the similarity or dissimilarity of the circumstances and conditions that forbid or permit a greater charge for a shorter distance. *In re* Louisville, etc., R. Co. (I. S. C. C.). 16.

Construction. The provisions of section one, requiring charges to be reasonable and just, and of section two, forbidding unjust discrimination, apply when exceptional charges are made under section four as they do in other cases. *In re* Louisville, etc., R. Co. (I. S. C. C.). 16.

Force in America of English decisions as to the Railway and Canal Traffic Act. 59 *n.*

INTERSTATE COMMERCE ACT—*Continued.*

Suspension. Section four of the "Interstate Commerce Act," prohibiting a greater charge for a short than for a long haul of similar traffic over a railway, will be suspended, pending investigation and hearing before the Interstate Commissioners, upon application of railway companies showing the necessity of charging less for "long" than for "short" hauls in order to meet water competition. *In re* Southern R.& S. Association (I. S. C. C.). 5.

INTERSTATE COMMERCE COMMISSION.

See CARRIERS; INTERSTATE COMMERCE ACT; RATES.

Advance construction. The Interstate Commerce Commission has no power to construe the Interstate Commerce Act in advance of the proper presentation to it of specific complaints that the law has been violated. *In re* Petition, etc. (I. S. C. C.). 8.

Affidavits, before whom taken. 4.

Amendments of pleadings allowed in discretion of commission. 4.

Copies of pleadings, opinions, etc., furnished on application and payment of expense. 4.

General request to suspend section four not acceded to. 7 *n.*

Long and short hauls. The existence of actual competition which is of controlling force, in respect to traffic important in amount, may make out the dissimilar circumstances and conditions entitling the carrier to charge less for the longer than for the shorter haul over the same line in the same direction, the shorter being included in the longer, in the following cases: 1. When the competition is with carriers by water, which are not subject to the provisions of the statute. 2. When the competition is with foreign or other railroads, which are not subject to the provisions of the statute. 3. In rare and peculiar cases of competition between railroads which are subject to the statute, when application of the general rule of the statute would be destructive of legitimate competition. *In re* Louisville, etc., R. Co. (I. S. C. C.). 16.

Long and short hauls. The prohibition in the fourth section of the Interstate Commerce Act against a greater charge for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance, as qualified therein, is limited to cases in which the circumstances and conditions are substantially similar. *In re* Louisville, etc., R. Co. (I. S. C. C.). 16.

Long and short haul charges. When a greater charge in the aggregate is made for the transportation of passengers or the like kind of property for a shorter than for a longer distance over the same line in the same direction, the shorter being included in the longer distance, it is not sufficient justification therefor that the traffic which is subjected to such greater charge is way or local traffic, and that which is given the more favorable rates is not. *In re* Louisville, etc., R. Co. (I. S. C. C.). 16.

—— Nor that the lesser charge on the longer haul has for its motive the encouragement of manufactures or some other branch of industry. *In re* Louisville, etc., R. Co. (I. S. C. C.). 16.

—— Nor that it is designed to build up business or trade centres. *In re* Louisville, etc., R. Co. (I. S. C. C.). 16.

—— Nor that the lesser charge on the longer haul is merely a continuation of the favorable rates under which trade centres or industrial establishments have been built up. *In re* Louisville, etc., R. Co. (I. S. C. C.). 16.

Long and short haul charges. The fact that long-haul traffic will only bear certain rates is no reason for carrying it for less than cost at the expense of other traffic. *In re* Louisville, etc., R. Co. (I. S. C. C.). 16.

Names of commissioners. 1.

INTERSTATE COMMERCE COMMISSION—*Continued.*

No opinion in advance as to rates. 7 *n.*
Petitions to the commission will be dismissed where they ask the commission to authorize rebates alleged to be lawful and proper. *In re* Export Trade (I. S. C. C.). 13.
Pleading before. Complaints under section 13 made by verified petition; facts constituting violation to be stated, how verified; copy to be furnished for each party complained of; full name of carrier defendant to be stated; indorsement required; defendant to be served, and required to satisfy or answer complaint. 2.
Procedure before. Carrier complained against may serve notice for hearing as upon demurrer; answer not admission of sufficiency of complaint; motion to dismiss for inefficiency may be made at hearing. 8.
Procedure before. Continuances. 3.
Rules. 1.
Sessions, general: when and where held. 1.
Sessions, special, to be regulated by commission. 1.
Subpœnas for witnesses issue by any commissioner; whether required to attend and produce books, papers, etc.; on application deposition may be taken of witness unable to attend. 4.
Suspension of 4th section, application for: proceedings on presentation of. 2.
Suspension of 4th section, applications for, to be made by petition. By whom made; must state what; how verified; notice and proof of publication required. 2.

LAND GRANT.

Construction of grant as to what lands were meant. 476.
Forfeiture. 476 *n.*
Generally. 477 *n.*
Homestead rights as against railway. 475 *n.*
Kansas land grant construed. The acts of Congress of March 3, 1863, 12 Stat. 772; July 1, 1864, 13 Stat. 339; and July 26, 1866, 14 Stat. 289, granting lands to the State of Kansas for railroad purposes, are to be construed *in pari materia*, and as having the one purpose of building a single road from Fort Riley, down the Neosho Valley, to the southern line of that State, and not as distinct grants for different roads, which may come in conflict in the claims under them in regard to the lands granted. Kansas City, etc., R. Co. *v.* Atty.-Genl. (U. S. S. C.). 467.
Same. The junction of this road with the one from Leavenworth by way of Lawrence, in the direction of Galveston Bay, as provided in the act of 1863, was not required to be on the very crest of the Neosho Valley, as reached by the latter road, but at a convenient point for such crossing in the narrow valley of the Neosho River; and as this point has been adopted by the companies building both roads, and accepted by the officers of the Land Department in selecting indemnity lands, there is no sufficient reason to be found in the point of junction to vacate the certification of these lands to the State for the company which has built the road and received the patents of the State. Kansas City, etc., R. Co. *v.* Atty.-Genl. (U. S. S. C.). 467.
Same. Nor is there any other sufficient reason found in the record in this case for setting aside the evidences of title to these lands issued to the corporation which built the road within the time required by law, to the approval of the officers of the government, whose primary duty it was to certify these lands, and who did so within the scope of their powers. Kansas City, etc., R. Co. *v.* Atty.-Genl. (U. S. S. C.). 467.
Indemnity or lieu lands. 475 *n.*
Northern Pacific grant construed. 476 *n.*

LAND GRANT—*Continued.*

Northern Pacific grant construed. The grant by the act of Congress of July 2, 1864, to the Northern Pacific R. Co., of lands to which the Indian title had not been extinguished, operated to convey the fee to the company, subject to the right of occupancy by the Indians. Butz *v.* North. Pac. R. Co. (U. S. S. C.). 455.

Same. Indian occupancy. The manner, time, and conditions of extinguishing such right of occupancy were exclusively matters for the consideration of the government, and could not be interfered with nor put in contest by private parties. Butz *v.* North. Pac. R. Co. (U. S. S. C.). 455.

Same. Indian title. Relinquishment. The agreement of the Sisseton and Wahpeton bands of Dakota or Sioux Indians for the relinquishment of their title was accepted on the part of the United States when it was approved by the Secretary of the Interior, on the 19th of June, 1873. That agreement stipulating to be binding from its date, May 19, 1873, and the Indians having retired from the lands to their reservations, the relinquishment of their title, so far as the United States are concerned, held to have then taken place. Butz *v.* North. Pac. R. Co. (U. S. S. C.). 455.

Same. Location. Pre-emption. Upon the definite location of the line of the railroad, on the 26th of May, 1873, the right of the company, freed from any incumbrance of the Indian title, immediately attached to the alternate sections; and no pre-emptive right could be initiated to the land, so long as the Indian title was unextinguished. Butz *v.* North. Pac. R. Co. (U. S. S. C.). 455.

Same. Withdrawal from sale or pre-emption. When the general route of the road provided for in section six of the act of July 2, 1864, was fixed, and information thereof was given to the Land Department by the filing of a map thereof with the Secretary of the Interior, the statute withdrew from sale or pre-emption the odd sections to the extent of forty miles on each side thereof; and, by way of precautionary notice to the public, an executive withdrawal was a wise exercise of authority. Butz *v.* North. Pac. R. Co. (U. S. S. C.). 455.

Same. Route fixed: when. The general route may be considered as fixed, when its general course and direction are determined, after an actual examination of the country or from a knowledge of it, and it is designated by a line on a map, showing the general features of the adjacent country and the places through or by which it will pass. Butz *v.* North. Pac. R. Co. (U. S. S. C.). 455.

Same. Exception. That part of section three of said act which excepts from the grant lands reserved, sold, granted, or otherwise appropriated, and to which a pre-emption and other rights and claims have not attached, when a map of definite location has been filed, does not include the Indian right of occupancy within such "other rights and claims;" nor does it include pre-emptions where the sixth section declares that the land shall not be subject to pre-emption. Butz *v.* North. Pac. R. Co. (U. S. S. C.). 455.

Sale of lands before building of road. 477 *n.*

Taxation. 476 *n.*

When title passes. 476 *n.*

LANDLORD AND TENANT.

See NUISANCE.

A landlord has no such interest in the growing crops of his tenants as to enable him to maintain an action against a person who injures the crops. Drake *v.* Chicago, etc., R. Co. (Iowa). 514.

LEASE.

Validity of oral agreement. 557 *n.*

MALICIOUS PROSECUTION.

Evidence of reasonable cause. St. Johnsbury, etc., R. Co. *v.* Hunt (Vt.). 234.

Reasonable cause. Advice of counsel. Defence. Where a party, before commencing suit, takes competent legal advice on a full and correct statement of all the material facts known to him, or that he had reason to believe existed, and acted honestly upon it, believing he had a cause of action, it is a defence. St. Johnsbury, etc., R. Co. *v.* Hunt (Vt.). 234.

MANDAMUS.

See HIGHWAYS.

To afford facilities. 54 *n.*

MARSHALLING CLAIMS.

See ACCOUNTS.

MASTER AND SERVANT.

Conflict of duties. Injury. In an action brought by an employee against a railroad company for injuries resulting from alleged negligence, evidence was introduced tending to show that a duty was imposed by the railroad company upon such employee, and afterwards another duty was assigned to him by his employer, without expressly relieving him from the performance of the first duty, and he could not act in the performance of both duties at the same time; and evidence was also introduced tending to show that he might have performed both duties by attending to one, and then to the other, alternately; and that he failed in the performance of one of such duties; and that, by reason of such failure, the injury for which he sued the railroad company resulted. *Held*, that an instruction by the court to the jury, in substance, that if, at the time of the injury, the plaintiff was in the discharge of the duty which he in fact performed, he might recover, notwithstanding the fact that he failed to perform the other duty, is misleading and erroneous. Union Pac. R. Co. *v.* Fray (Kan.). 309.

Conflict of duties. Where a duty is imposed by a railroad company upon one of its employees, and afterwards another duty is assigned to him by his employer, without expressly relieving him from the performance of the first duty, the question whether the assignment of this second duty relieves him from the performance of the first duty is a question of fact, to be submitted to the jury upon the evidence, and is not a question of law. Union Pac. R. Co. *v.* Fray (Kan.). 309.

Liability of company for acts of contractors and their servants. 589 *n.*

MORTGAGE.

See ACCOUNTS; COUPONS; "NET EARNINGS."

Articles in mortgage relating to default in payment of interest construed. 408 *n.*

Construction of agreement made to prevent foreclosure. 392 *n.*

Mortgage and bonds construed, and manner of accounting directed. Barry *v.* Mo., Kan. & Tex. R. Co. (U. S. C. C.). 384.

MUNICIPAL CORPORATIONS.

Control of highways and bridges. Cities and villages incorporated under the general incorporation law are made the representatives of the State with respect to the control of streets and highways and bridges within their limits, and are invested with power to lay out, alter or vacate streets, regulate the use of the same, and to construct and keep in repair bridges, viaducts, etc., and regulate the use thereof. McCartney *v.* Chicago, etc., R. Co. (Ill.). 326.

Entrance to city. Limitation. Where a railway company is authorized to build a railroad from a city to another place, the fact that it is also empowered to contract with a horse railroad company for the joint or separate operation of either or both companies' roads, as may be agreed on, will not operate as a limitation upon the railway company in respect to its entrance into the city. McCartney *v.* Chicago, etc., R. Co. (Ill.). 326.

NAVIGABLE WATERS.

See WATERS.

Fee of soil under river, in abutting owners. The owner of lots on each side of a navigable river, as the Chicago river, is also the owner of the underlying soil of the river, and may make any use of the river bed that suits his purpose, so that it does not materially or unlawfully interfere with the public easement to the use of the water in the stream. McCartney *v.* Chicago, etc., R. Co. (Ill.). 326.

NEGLIGENCE.

See ANIMALS; BRAKES; CARRIER; FIRE, and other specific titles.

At crossings. 434 *n. et seq.*

Averment of injury. 438 *n.*

Averment of. Negligence on the part of a railroad company is the basis of the right of the owner of the live stock to recover, and it must be averred in the declaration, and be proved. Savannah, etc., R. Co. *v.* Geiger (Fla.). 274.

Contributory. Defence. Negligence on the part of a plaintiff which contributes to the injury of which he complains is a matter of defence which the defendant must set up and maintain by proof, unless the plaintiff's own evidence in support of his cause of action shows that a presumption of contributory negligence is plainly inferable from said evidence, in which case the burden of proof is shifted, and it becomes the duty of the plaintiff to remove such presumption. Louisville, etc., R. Co. *v.* Yniestra (Fla.). 297.

Contractor's servants. When a railroad corporation enters into an agreement with a contractor to build a portion of its railroad, the locomotives, cars, etc., used in such construction, and run exclusively under the direction and control of the contractor until the road is completed and turned over to the corporation, the railroad company will not be liable for damages occasioned by the negligence of the persons running such locomotives and cars. Hitte *v.* Republican Valley R. Co. (Neb.). 586.

Contributory. Duty to get cattle off tracks. Where the owner of cattle sees them in danger on a railroad track, and can, by reasonable exertion, get them off, he is bound to do so; and if he does not, and they are injured by a passing train, he cannot recover. The owner, in such case, has no right to rely upon the performance of the duty which the law imposes on the company of giving warning signals. Milburn *v.* Kansas City, etc., R. Co. (Mo.). 244.

Contributory. Knowledge of defect in fence. 293 *n.*

Contributory negligence is a matter of defence, and the burden of proving it

NEGLIGENCE—*Continued.*

is on defendant. It is not necessary, therefore, that the plaintiff should allege in his complaint that he exercised due care. Crouch *v.* Charleston, etc., R. Co. (S. C.). 495.

Contributory. Notwithstanding the fact that a person may be guilty of a negligent act from which injury results to another, yet if the person injured could by exercising ordinary prudence have prevented said injury, or by his own act he contributed to said injury, he cannot recover damages resulting therefrom. Louisville, etc., R. Co. *v.* Yniestra (Fla.) 297.

Contributory. Parent and child. 439.

Contributory. Question of fact or law. Ordinarily the question of contributory negligence is a question of fact for a jury under instructions from the court; but when there is no contradiction in the evidence, and the facts are undisputed, and the conclusion and inference to be drawn from it is indisputable, involving only a common instinct of mankind—self-preservation—it becomes a question of law. Louisville, etc., R. Co. *v.* Yniestra (Fla.). 297.

Failure to have air-brakes. 294 *n.*

Failure to slow speed. In an action against a railroad for the negligent killing of plaintiff's cows by its trains, on a public crossing, mere proof that the speed of the trains was not checked, and that the cattle could have been seen eighty rods off, does not establish defendant's negligence. Milburn *v.* Kansas City, etc., R. Co. (Mo.). 244.

Growth of bushes as evidence of. 294 *n.*

It is not necessary to a defendant's liability, after his negligence has been established, to show, in addition thereto, that the consequences of his negligence could have been foreseen by him; it is sufficient if the injuries are the natural, though not the necessary or inevitable, result of the negligent fault,—such injuries as are likely in ordinary circumstances to ensue from the act or omission in question. Miller *v.* St. Louis, etc., R. Co. (Mo.). 254.

Liability in case of accident where one company runs trains upon tracks of another. 115 *n.*

Proof of contributory, bars action. Milburn *v.* Kansas City, etc., R. Co. (Mo.). 244.

The injury must be solely caused by the negligence of the defendant. It is not enough that it should be essentially so caused. Louisville, etc., R. Co. *v.* Yniestra (Fla.). 297.

Use of track. Injury to others to be avoided. The right of a railroad company to the use of its track is nothing more than the right of every other land proprietor in the actual use and occupancy of his land, and does not exempt the company from the duty enjoined by law upon every person so to use his own property as not to do any unnecessary injury to another. Savannah, etc., R. Co. *v.* Geiger (Fla.). 274.

Walking on track. When a person voluntarily walks on and along the tracks of a railroad laid in a public thoroughfare which he knew was used as a switch-yard on which locomotives were passing to and fro night and day, where the walking on either side of said track was as good as on the track, and in doing so is run over by a passing train and killed, he has, by the failure to exercise ordinary care and prudence, directly contributed to his own misfortune, and his representatives cannot recover from the company using said track damages therefor. Louisville, etc., R. Co. *v.* Yniestra (Fla.). 297.

Walking on track. When a railroad track by authority of law is laid in a public thoroughfare, the right of the company owning said track to operate trains thereon is superior to the right of the general public to walk along said track; but having a superior right thereon does not relieve the company from liability to damage for injury to persons caused solely by its negligence in using said track. Louisville, etc., R. Co. *v.* Yniestra (Fla.). 297.

"NET EARNINGS."

See ACCOUNTS.

Defined. As a general proposition, the "net earnings" of a railroad company are the excess of the gross earnings over the expenditures defrayed in producing them, aside from, and exclusive of, the expenditure of capital laid out in constructing and equipping the works themselves. Barry v. Mo., Kan. & Tex. R. Co. (U. S. C. C.). 384.

NONSUIT.

See PRACTICE.

NOTICE.

Of petition before Interstate Commerce Commission. 2.

Record of a deed from the owner of land granting a right of way over the same, one hundred feet wide, for any and all railroad purposes, the use for which purposes injuriously affects other portions of the land adjoining the right of way, is notice to any subsequent purchaser of adjoining lots, of the prior grantee's rights, and such purchaser will occupy no better position than his vendor or grantor. Chicago, etc., R. Co. v. Smith (Ill.). 558.

NUISANCE.

See GRANT.

A tenant rented certain land for the year 1877, knowing that a railroad company maintained a nuisance thereon in the shape of a pond of water, which affected the health of his family. With this knowledge, he rented the place for the year 1878, when it became more sickly, so much so that he was unable to gather his crops; and an action was brought against the railroad. *Held*, that the landlord had the right to use and occupy the place, and under his lease the tenant had the same right, and he could presume that the railroad company would abate the nuisance. The law did not require him to move away, but did require the company to abate such nuisance; and it was therefore not error to refuse to charge that if the plaintiff could have avoided the injury to himself, he could not recover. Central R. v. English (Ga.). 530.

Standing water. 533 *n*.

Where one railroad company erected a nuisance, and was subsequently leased to another company, which continued to maintain such nuisance, if the owner of the property on which it was situated notified the president and officers of the lessee company of it, and his tenant also notified the section-master of the company, this was sufficient notice and demand for abatement, and the tenant could bring an action for injuries resulting to him without more. Notice of the nuisance is sufficient. Central R. v. English (Ga.). 530.

OFFICERS.

Contract with director voidable. A contract entered into between several individuals on one part, and a railroad corporation on the other, where one of the parties of the first part, at the time the contract was made, was a director of the corporation, and took part in making the same, is voidable, at the option of the railroad corporation. Munson v. Syracuse, etc., R. Co. (N. Y.). 377.

ONUS PROBANDI.

In actions for killing animals. 397 *n.*

Observations as to the onus of proof with regard to contributory negligence. Wakelin *v.* London, etc., R. Co. (Eng.). 495.

PARENT AND CHILD.

Contributory negligence. 439 *n.*

PASSENGER.

Liability of operated company for injury to. By the terms of a written contract entered into between the Missouri Pacific R. Co. and the defendant, the passenger trains of the latter were to be drawn over the road of the former between the town of Pacific, defendant's eastern terminus, and the city of St. Louis; the Missouri Pacific company using its own locomotive and crew of same, and the defendant furnishing at its own expense all train men for the care and management of its trains, the manner of running the latter and the control and acts of said train men being subject to the rules and regulations of the Missouri Pacific company while so running on its track. *Held*, that there could be no recovery against defendant for the death of a passenger caused by the failure of the train to stop long enough for the deceased to alight at his destination and while the train was being operated between St. Louis and Pacific, the deceased having purchased his ticket from the Missouri Pacific company, and for transportation between St. Louis and the town of Webster where the accident occurred. Smith *v.* St. Louis, etc., R. Co. (Mo.). 106.

Liability for injury to. If the deceased was lawfully on defendant's train, and it had been operated by servants under its control, the defendant would be liable for an injury occasioned by the negligence of such servants, and this, too, irrespective of the company from which the ticket was purchased. Smith *v.* St. Louis, etc., R. Co. (Mo.). 106.

PENNSYLVANIA RAILROAD.

For construction of the charter powers, etc., of this company, see Penna. R. Co. *v.* Duncan (Pa.). 854.

PLEADING.

See INTERSTATE COMMERCE COMMISSION; NEGLIGENCE.

Averring written contract. Although a contract not alleged to be in writing will be presumed verbal, it is sufficiently shown to be in writing where it is averred that "a copy of said written contract is herewith filed, and made part of this answer, as Exhibit A." Burrow *v.* Terre Haute, etc. R. Co. (Ind.). 574.

Averment of injury. 438 *n.*

Before Interstate Commerce Commission. 2.

Petition to condemn lands. Sufficiency. It is not necessary that a petition for the condemnation of a right of way over a tract of land for a railroad should state the petitioner's purposes fully and completely, giving the number of tracks, and a purpose to allow other companies to use the same. It is sufficient for the petition to show, generally, that the land is needed for railroad purposes. Chicago, etc., R. Co. *v.* Smith (Ill.). 558.

Statement. Double damages. A statement against a railroad company for double damages for killing plaintiff's hogs, which alleges that they strayed

PLEADING—*Continued.*

upon defendant's road at a place where it is required by law to erect and maintain lawful fences on the sides of its road, which it failed to do, by reason of which said hogs were run over and killed by defendant's cars, although defective in not averring that the point was not at a public or private crossing, nor within the limits of an incorporated town or city, is sufficient after verdict when the deficiency has been supplied by the evidence. Stanley *v.* Mo. Pac. R. Co. (Mo.). 250.

POLICE REGULATION.

Storage of fertilizer. The municipal authorities of the city of Athens passed an ordinance that "no person or persons shall be allowed to store any guano or commercial fertilizer at any point within the corporate limits of the city of Athens without first obtaining the consent of the mayor and council." At that time, the Georgia Railroad had within the city of Athens, on the east side of the Oconee river, a depot and a building for the storage of commercial fertilizers, in which they were then stored. Subsequently the railroad company abandoned this depot and building and moved across the river, nearer the centre of the city, and at great expense erected other depot buildings and a house wherein they stored commercial fertilizers for their consignees. No objection was made to this by the municipal authorities; but subsequently they fined the railroad agent and threatened further punishment both to him and the consignees. *Held*, that the ordinance does not apply to such a storehouse of the railroad; and the municipal authorities having seen the company move its depot and proceed to erect buildings, without objection or warning that it would not be allowed to store fertilizers there, they are now estopped from asserting the ordinance against the company. Mayor *v.* Georgia R. Co. (Ga.). 477.

Same. Validity of ordinance. Whether the ordinance is prohibitory and in restraint of trade, and therefore contrary to public policy and void, is not decided. The act of December 21, 1833 (Prince's Dig. 304), authorizing the Georgia R. Co. to purchase all land contiguous thereto "that may be found necessary for the erecting toll-houses, storehouses, workshops, barns, etc.," invested that company with the right to purchase land and erect storehouses in the city of Athens, and to store therein such merchandise, commercial fertilizers and other freight as was necessary for its preservation and security, and the city of Athens has no power under its municipal authority to declare such storehouses, so erected and stored with freight, nuisances, or to abate the same, or to punish the company or its servants or agents for such storage. Mayor *v.* Georgia R. Co. (Ga.). 477.

POWER OF ATTORNEY.

A written instrument conveying to persons named a right of way for a railroad is not a power of attorney, but vests an estate in the persons named. Burrow *v.* Terre Haute, etc., R. Co. (Ind.). 574.

PRACTICE.

See Costs.

Continuance. Where the court allows a party to introduce further evidence after both parties have rested, it is within its discretion to grant a continuance for the reason that the opposite party's witnesses have left the court. Voorhees *v.* Chicago, etc., R. Co. (Iowa.). 322.

PRACTICE—*Continued.*

Nonsuit. Where the plaintiff proves ownership and the killing, and rests his case under the rule in Danner's Case, and defendant produces no evidence, but moves for a nonsuit, such motion is rightly denied. Joyner *v.* South Carolina R. Co. (S. C.). 258.

The supreme court will not reverse a cause so that the plaintiff may widen his petition to conform with the proofs admitted in the case, and compel the lower court to try the identical issue again. Nor will it do so to afford a party a benefit and an advantage he has already received. Wise *v.* Joplin R. Co. (Mo.). 164.

PRESUMPTION.

In action against railroad companies for damages resulting from sparks of fire from a locomotive, negligence will be presumed from proof of the accident and the injury, and this applies to chartered as well as to other railroads. Diamond *v.* Northern Pac. R. Co. (Mont.). 117.

Prima facie case. Evidence in plaintiff's behalf *held* sufficient to raise a presumption of negligence on the part of the defendant; and the question whether, under the circumstances disclosed, such presumption was rebutted by the testimony of defendant's witnesses was for the jury. Nichols *v.* Chicago, etc., R. Co. (Minn.). 175.

PROCEDURE.

See INTERSTATE COMMERCE COMMISSION.

On presentation of application to suspend fourth section of the Interstate Commerce Act. 2.

PROMOTER.

A contract entered into by the promoter of a corporation does not bind the corporation. Munson *v.* Syracuse, etc., R. Co. (N. Y.). 377.

QUO WARRANTO.

See FORFEITURE.

RAILWAY COMPANIES.

Status of, legal. 52 *n.*

RATES.

See CARRIERS; COMPETITION; DISCRIMINATION; INTERSTATE COMMERCE COMMISSION.

Alternative: posting. Where a railway company has alternative charges for the carriage of goods, according as they are carried at owner's risk or not, it is not necessary that the tolls should be exhibited on a board, as prescribed by 8 Vict. c. 20, s. 93, in order that the consignor may have a reasonable alternative offered to him. Great West. R. Co. *v.* McCarthy (Eng. H. of L.). 87.

Competition justifies lower. 60 *n.*

Equal, under some English decisions. 59 *n.*

Fair interests of railway to be considered. 60 *n.*

REGULATIONS.

Enforcement, action for. It is no ground for damages against the company that a drayman was discharged by his employer, because an agent of the company informed the employer that the drayman would not be allowed to violate proper regulations of the company. Donovan *v.* Texas & P. R. Co. (Tex.). 320.

Enforcement, action for. It is the duty of agents of a railway company to enforce the regulations of the company, but not to give reasons why such regulations were made; and if, in giving such reasons, they use actionable language, they, and not the company, will be liable. Donovan *v.* Texas, etc., R. Co. (Tex.). 320.

Warehouse. Receipt and delivery of freight. A railway company has the right to require persons hauling freight from its depot to receive the same on the platform from its servants and not to enter the warehouse for the purpose of checking off the freight; and also to require that persons doing business with the company shall transact the same over the counter, and not enter behind it. Such regulations are reasonable. Donovan *v.* Texas, etc., R. Co. (Tex.). 320.

RES ADJUDICATA.

A decision on demurrer is conclusive in subsequent proceedings in the case when nothing further bearing upon the point appears. St. Johnsbury, etc., R. Co. *v.* Hunt (Vt.). 234.

REVERSION.

See WATERS.

RULES.

Interstate Commerce Commissioners' rules. 1.

SALE.

Offer. Acceptance. A reply to an offer of sale, purporting to accept it on terms varying from those offered, is a rejection of the offer and leaves it no longer open. On December 8, A offered to sell to B 2000 to 5000 tons of iron rails on certain terms specified, adding that if the offer was accepted A would expect to be notified prior to December 20. On December 16, B replied, directing A to enter an order for 1200 tons, "as per your favor of the 8th." On December 18, A declined to fulfil B's order. *Held*, that the negotiation between the parties was closed, and that an acceptance by B on December 19 of the original offer did not bind A. Minneapolis, etc., R. Co. *v.* Columbus R. M. Co. (U. S. S. C.) 588.

SIGNALS.

See note 434 *et seq.*

SPECIAL INTERROGATORIES TO JURIES.

Where special questions of fact are submitted to the jury for their answers, it is erroneous for the court to instruct the jury that "in case no evidence can be found bearing upon the question required to be answered, the jury

SPECIAL INTERROGATORIES TO JURIES—*Continued.*

will say, 'Don't know,' or, 'Cannot answer from the evidence.'" Union Pac. R. Co. *v.* Fray (Kan.). 309.

In such a case, where the jury answer eight of such questions by simply saying, "Don't know," and the questions are material, and there was some evidence introduced on the trial applicable to all of them, and the court refused to require the jury to answer these questions in a proper manner, *held*, error. Union Pacific R. Co. *v.* Fray (Kan.). 309.

SPECIFIC PERFORMANCE.

Condition must be performed before conveyance can be compelled. 582 *n.*
Contracts as to right of way. 548 *n.*

SPEED.

Violation of ordinance. 489 *n.*

STARE DECISIS.

See INTERSTATE COMMERCE ACT.

STATIONS.

Compelling construction. Demand. A court of equity will compel a railway company to construct a depot and give other railroad facilities at a proper and necessary place. As the duty to establish stations upon a public railway is a public duty, no demand for the placing of a station need be made by the State before bringing suit to enforce the duty. North. Pac. R. Co. *v.* Territory (Wash.). 82.

Compelling erection of. 485.
Duty to fence. 293 *n.*
Duty to provide. There is nothing in the provisions of the general railroad act—Laws of 1850—by which a company organized thereunder can be compelled to provide suitable freight and passenger houses at a village located upon the line of the road. The law leaves the matter entirely to the discretion of the company. Neither have the railroad commissioners any authority which can be enforced in the courts to require the company to provide such accommodations. People *v.* New York etc., R. Co. (N. Y.). 480.

Grounds *held* not a part of yard. 293 *n.*

STOCK.

See DIVIDENDS.

STATUTE OF FRAUDS.

A written contract releasing all claims for damages, and conveying a right of way for a railroad, is not within the statute of frauds, although the right of way is not specifically described. Burrow *v.* Terre Haute, etc., R. Co. (Ind.). 574.

STREET RAILWAYS.

See HIGHWAYS.

TAXATION.

Bridges, etc., of railway. Constitutionality of tax. The statute of Arkansas of March 31, 1883, § 46, which directs the board of railroad commissioners not to include the embankments, tunnels, cuts, ties, trestles, or bridges of railroads in the schedule of the property of railroad companies, prepared by them for the purpose of assessment of taxes, is in conflict with the provisions in the constitution of the State of 1874, relating to the assessment and taxation of property within the State. Huntington *v.* Worthen (U. S. S. C.). 280.

Consolidation. When two railroad corporations whose shares are by a State statute exempt from taxation within the State, and a third company created under the laws of another State and whose road is in the latter State, consolidate into a new company, and issue shares in the new company in exchange for shares in the old company, the right of exemption from taxation in the first State passes into the new shares and into each of them, unless a law of the first State makes provision to the contrary. Tennessee *v.* Whitworth (U. S. S. C.). 211.

Earnings in lieu of. A line of railroad from Brainerd to Watab, formerly a part of the chartered line of the St. Paul & Pacific R. Co., was constructed by the Western R. Co. of Minnesota in 1877-78, under chap. 201, Sp. Laws 1877, by force of which act the forfeited franchises, privileges, and immunities of the former corporation, appertaining to this line of road, were transferred to the latter company. *Held*, that the same obligation, as respects the percentage of earnings to be paid to the State in lieu of taxation, attended the franchises and immunities thus transferred as the original company would have been subject to if it had constructed this line of road. Hence, pursuant to the provisions of chap. 6, Sp. Laws 1865, this defendant, operating this section of road under lease from the Western R. Co., was liable to pay to the State, for the year 1885, *three* per cent of the gross earnings therefrom. State *v.* North. Pac. R. Co. (Minn.). 219.

Earnings in lieu of. The percentage required to be paid to the State by a railroad corporation accepting the provisions of chap. 111, Sp. Laws 1878 (prescribing the percentage of earnings to be paid by the St. Paul, Stillwater & Taylor's Falls R. Co.), pursuant to section 2 of that act, is to be graduated with reference to the time of the completion of 80 miles of its own line of road, and not with reference to the fixed date named in that act with respect to the St. Paul, Stillwater & Taylor's Falls R. Co. State *v.* North. Pac. R. Co. (Minn.). 219.

Earnings in lieu of. This construction applied to the line from Watab to Minneapolis, operated by this defendant, subjects it to the payment of 1 per cent of its gross earnings. State *v.* North. Pac. R. Co. (Minn.). 219.

Exemption. 218 *n.*

Exemption, act modifying. Acceptance. The right of exemption being a contract between the State and the corporation, the Minnesota act of March 2, 1865 (Sp. Laws, c. 6), modifying that exemption, was ineffectual until accepted by the corporation. It not appearing that this was accepted until after the act of March 4, 1865 (Sp. Laws, c. 9), the latter act (protecting as against tax proceedings the title remaining in the corporation after the lands had been contracted to be sold) is to be deemed a tender by the State of a new contract, which upon acceptance became effectual. *In re* Proceedings, etc. (Minn.). 225.

Exemption. A State statute incorporating a railroad company, which provides that the capital stock of the company shall be forever exempt from taxation, and that the road with all its fixtures and appurtenances shall be exempt from taxation for the period of twenty years and no longer, exempts the road, its fixtures and appurtenances, from taxation only for the termed named in the act; but forever exempts shares in the capital stock of the company, in the hands of the various holders, from taxation in the State. Tennessee *v.* Whitworth (U. S. S. C.). 205.

Exemption: conveyance of, to successors. First Division St. P. & P. R. Co.

TAXATION—*Continued.*

v. Marcher, 14 Minn. 297 (Gill, 224), and other cases, followed; holding that the exemption from ordinary taxation, originally created in favor of the Minnesota & Pacific R. Co., passed, with the lands to which it was appendant, to the St. Paul & Pacific R. Co., and to the First Division of the St. Paul & Pacific R. Co. *In re* Proceedings, etc. (Minn.). 225.

Exemption. Consolidation. When two railroad corporations, whose shares are by a State statute exempt from taxation in the State, consolidate themselves into a new company under a State law which makes no provision to the contrary, and issue shares in the new company in exchange for shares in the old company, the right of exemption from taxation in the State passes into the new shares and into each of them. Tennessee *v.* Whitworth (U. S. S. C.). 205.

Exemption from, is a franchise. See FRANCHISE.

Exemption. Shares. The right to have shares in its capital stock exempt from taxation within the State is conferred upon a railroad corporation by State statutes granting to it "all the rights, powers and privileges," or granting it "all the powers and privileges," conferred upon another corporation named, if the latter corporation possesses by law such right of exemption; and there is nothing in the provision of art. xi., sec. 7, of the Tennessee constitution of 1834 to change this general rule when applied to a statute of that State. Tennessee *v.* Whitworth (U. S. S. C.). 211.

Exemption. Tax sale. It being established by the admission of the parties that the respondent succeeded to the ownership of certain lands formerly granted to and held by the Minnesota & Pacific R. Co. and its successors, and to the exemption from ordinary taxation formerly enjoyed by those corporations and pertaining to such lands, *held*, that the title remaining in the respondent after it had contracted to sell such lands (the purchase price being still unpaid, and the conditions of the purchase being still unperformed) is protected, in accordance with the terms of the act of March 4, 1865, from sale for taxes. *Held*, following former decisions, that the provisions of law relating to such exemption (originally created prior to the adoption of the constitution) are not unconstitutional. The Minnesota act of March 4, 1865, was not repealed by the general tax law of 1878. *In re* Proceedings, etc. (Minn.). 225.

Exemption. The provision in the State constitution of Missouri of 1865, that "no property, real or personal, shall be exempt from taxation, except such as may be used exclusively for public schools, and such as may belong to the United States, to this State, to counties, or to municipal corporations within the State," applies to stock issued for constructing branches of the St. Joseph & Iowa R. in that State under the provisions of the statute of March 21, 1867, "to aid in the building of branch railroads in the State of Missouri;" and the provision in the charter of that railroad company, enacted in 1857, that its stock should be exempt from taxation for State and county purposes, does not apply to the stock issued for branches constructed under the act of 1868. Chicago, etc., R. Co. *v.* Guffey (U. S. S. C.). 200.

Immunity from taxation by the State will not be recognized unless granted in terms too plain to be mistaken. Chicago, etc., R. Co. *v.* Guffey (U. S. S. C.). 200.

License and privilege taxes. 200 *n.*

Occupation tax law construed. Construing that portion of the act of March 24, 1881 (Gen. Laws, p. 85), which undertakes to impose on "every firm, person, or association of persons owning or running any palace, sleeping, or dining-room cars not owned by the railroad company in this State" an annual tax of $2 per mile, etc.; *held:* (1) The tax contemplated is not a tax on property, which under the constitution must be taxed in proportion to value; nor is it a tax on persons, which must be uniform on the same class of subjects, to be legal. (2) It is an occupation tax. (3) By its terms the act applies to three classes of persons, viz.: 1st, to the

TAXATION—*Continued.*

owner of the car who runs it, or permits it to be run, on a railway; 2d, to others, not the owners of the railway or cars, who run them; 3d, to railway companies or others who run such cars on their own roads, and as to whom the law imposes no tax. (4) The subject of an occupation tax is the thing or business done; and, so far as regards the business of running a Pullman sleeping car, it is the same whether the car be run by the owners of the railway, and belongs to them, or be run and owned by those who have no interest in the railway. It results that a tax imposed on one running a sleeping car over the railway of another, when the same law exempts from tax the act of running the same description of cars over the road of the car owner, is not a tax equal and uniform, but is violative of the constitution, and cannot be collected. (5) The fact that the railway company which owns and runs its own sleeping cars, over its own road, pays an *ad valorem* tax cannot affect the question. (6) Nor can the constitutional requirement in reference to occupation taxes be evaded by the fact that one pursuing the occupation pays an income tax. Neither can it be evaded on account of the fact that an occupation tax is paid by the party on a business kindred to that for pursuing which the occupation tax is claimed. Pullman, etc., Co. *v.* Texas (Tex.). 194.

Occupation tax. Uniformity. An occupation tax which is not equal and uniform, but which exempts one class of persons pursuing an occupation, and imposes a tax on others pursuing the same occupation, is unconstitutional, void, and can be enforced against neither class of persons. Pullman, etc., Co. *v.* Texas (Tex.). 194.

Of railway lands. 476 *n.*

Pullman cars. A railroad company in this State cannot be taxed under the Act of 1871 (Laws 1871, p. 56), upon the cars of the Pullman Palace Car Co., leased and operated by it. State *v.* St. Louis Co. (Mo.). 192.

Return as to right of way. Even if there was a discrepancy in the return as to the number of acres constituting the right of way, all the right of way was intended to be embraced within the return made; and if the correct number of acres was not stated, that would not justify the local assessor in assessing any portion of the right of way. Peoria, etc., R. Co. *v.* Goar (Ill.). 189.

Track and improvements of company. 192 *n.*

Track. Error. Where, by mistake, property was listed on schedule "D" when it should have been specified on Schedule "A," and the property being in the open and visible use and occupation of the company for railway purposes, the mistake must have been palpable to the local assessor, and he must have known it was property which he had no authority to assess—the company was not estopped by his schedules from saying that the property in question was railroad track. Peoria, etc., R. Co. *v.* Goar (Ill.). 189.

Track. The right of way of a railroad, including the superstructures of main, side, or second track, and turnouts, and the stations and improvements of the railroad company on such right of way, shall for the purposes of taxation be held to be real estate, and denominated "railroad track," and shall be assessed by the State board of equalization. Its assessment by the local township assessor is void. Peoria, etc., R. Co. *v.* Goar (Ill.). 189.

Track. Under the revenue laws of Indiana, lands occupied by a railroad company with its main track, side tracks, depot, round-house, coal-sheds, and water-tanks are to be valued and assessed by the State board of equalization as "railroad track," and cannot be assessed by the local authorities. Pfaff *v.* Terre Haute, etc., R. Co. (Ind.). 181.

TORT.

Right of action arising upon, is assignable. Snyder *v.* Wabash, etc., R. Co. (Mo.). 237.

TRACK.

Location. "To" and "from" construed. The words "to" and "from" a place or city are construed to mean to or from a point within the place to or from which a corporation is authorized to construct a railroad. Authority to construct and operate a railroad from the city of Chicago to any point in the town of Evanston is held to authorize the location and operation of the road from any point within the city of Chicago. McCartney *v.* Chicago, etc., R. Co. (Ill.). 826.

Relocation. The charter of a railway company conferred the power of relocation, and an ordinance of a city was passed giving the company permission to construct and operate its road in and over certain streets of the city, and over a bridge to be built at a certain place, and such ordinance was confirmed by an act of the legislature, which conferred the same power as the ordinance, until the same might be altered, changed or amended by the city council, with the consent of the company, and gave such power to amend, alter or change the ordinance, with the company's consent. It was *held* that such company, after having once located and built its road within the city, had still ample legitimate authority, with the consent of the city, to relocate its track within the city, and take up its former track. McCartney *v.* Chicago, etc., R. Co. (Ill.). 826.

Use of, by the public when laid in street. See NEGLIGENCE.

Use of, for freight cars. Where a railroad company lays its track in a street of a city, having the right to construct a track for passenger cars only, the city has no power afterward to grant the use of the track for the operation of freight cars upon it, except upon a petition of property owners upon the street, as required in the statute; and a grant of the use of such track for freight purposes without the petition of property owners being void, such use is unlawful and a public nuisance, which the State may cause to be abated. McCartney *v.* Chicago, etc., R. Co. (Ill.). 826.

TRESPASS.

Cutting grass. The owner of the fee cannot maintain trespass against a section-man on a railroad for cutting and carrying away the hay and grass growing within the lines of the location, under instructions from the general manager and roadmaster to cut and burn the bushes, grass, and rubbish within his section. Hayden *v.* Skillings (Me.). 816.

Person on a railway crossing is not a trespasser. 434 *n.*

Removal of herbage, etc., in right of way. 818 *n.*

TRUST.

See ACTIONS.

VERDICT.

Not disturbed in case of stock-killing. 294 *n.*

WATERS.

See BRIDGE; GRANT; NAVIGABLE WATERS.

Deed of river bank. A general deed of premises lying upon the bank of a river, in which is constructed a canal, conveys the grantor's rights to the centre of the stream bounding the property; and to reserve or exclude from the grant any such rights, the conveyance should contain proper words of such reservation or exclusion. Day *et al. v.* Pittsburg, etc., R. Co. (Ohio). 564.

Ditches, diversion of surface-water by. 529 *n.*

WATERS—*Continued.*

Embankment, injury by. In the absence of negligence, unskilfulness, or mismanagement in the construction of an embankment for its road-bed over land through which there is no natural channel for the passage of water, a railroad, having lawful authority to construct such road-bed, is liable for the injury done by the embankment in causing water to overflow land of an adjoining proprietor. Jones *v.* St. Louis, etc., R. Co. (Mo.). 523.

Equitable relief for disturbance of right to. A bill by a manufacturing company, which states that complainant owns the water-power and canal included in its premises, and that the present flow of water is no more than sufficient to carry its various mills and machinery now dependent on it for propelling power; that defendant without authority threatens, and has already commenced, to place two stone piers, to support an iron bridge to be used by it for railroad purposes, extending out into the canal on either side dtagonally across it; and has taken forcible and violent possession of the property and deprived complainant of his water-power and mills, and threatens to continue such possession, to the irreparable damage of the complainant,—states facts which entitle complainant to that preventive remedy which a court of equity alone can grant. Newaygo Mfg. Co. *v.* Chicago, etc., R. Co. (Mich.). 505.

Injury by flooding. Where a railway company digs ditches along its right of way, whereby surface-water is diverted, and plaintiff's land is flooded, but such flooding is increased by the drainage of lands adjacent to the railway, by artificial ditches discharging into the railway ditch, without the company's consent, the company is not liable for the increased damage caused by such means, without its consent. Chicago, etc., R. Co. *v.* Glenney (Ill.). 527.

Injury to mill by obstructing natural flow of stream. 514 *n.*

Lessening volume of water. Damages. A railroad company, in the repair of its road-bed at a point several miles above the plaintiff's mill, caused large quantities of mud to be washed down into a creek, by the process of sluicing, thereby lessening the volume of water used in operating the plaintiff's mill and causing the damage complained of; whether the company is liable in such case for consequential damages growing out of the exercise of a right conferred in its charter—*quære.* But if the power was exercised recklessly and without a due regard to the interests of others, the company would be liable for the resultant injury. Salisbury *v.* West. N. Car. R. Co. (N. C.). 518.

Obstruction of canal by bridge. Where defendant had no legal right, without the consent of complainant, to place piers for a new bridge, where the attempt was made to locate them, it was of no consequence whether complainant suffered damage or not by the proposed erections on the canal and middle ground, so far as complainant's rights are concerned. It was his right to have the use of the canal and its embankments free and unobstructed by defendant's new bridge, and the act of the latter in its attempt to infringe that right was a wilful trespass which should be restrained. Newaygo Mfg. Co. *v.* Chicago, etc., R. Co. (Mich.). 505.

Obstruction of navigation by bridge. 494 *n.*

Overflow. Negligence. See opinion for facts under which it was held that a judgment against a railway company for damages, alleged to have been caused by the overflow of land in consequence of its bridge being improperly constructed, was error. International, etc., R. Co. *v.* Klaus (Tex.). 500.

Obstruction to flow of. 502 *n.*

Railway diverting water used in operating mill. 521 *n.*

Reversion of rights. Where a canal company owning and operating a canal had the right only to use for canal purposes the bed and waters of a river, on ouster of such company from its corporate franchises and its dissolution by order of this court, the trustees winding up its affairs have

WATERS—*Continued.*

no power to convey such rights, but they revert to the proper owners. Day *v.* Pittsburg, etc., R. Co. (Ohio). 565.

River bank. Right of way. Extent. 574 *n.*

Spring, diverting water of. 539 *n.*

Spring, injury to. Where the plaintiffs conveyed land to a railroad company for a railroad, and in the conveyance an agreement was inserted that the company should convey the water from a spring on the land by a pipe to the south line of the road so as to be accessible for watering plaintiff's stock, *held*, that it was not the spring in its then state which was to be preserved, but the water which issued into it. *Held* further, that if the spring was destroyed by quarrying for the construction of the road, and the water thereof collected elsewhere, and was conducted to the place agreed, in equal quantity and purity and as accessible as reserved in the deed, the actual destruction of the old site of the spring gave plaintiffs no cause of action. *Held* further, that the damages which plaintiffs are entitled to recover for a breach of the agreement are those sustained in not having water for their stock, and not the difference in value between plaintiff's farm with and without the spring. Chamberlain *v.* Baltimore, etc., R. Co (Md.). 533.

Surface-water. Diversion by railway embankment. 525 *n.*

Watercourse defined. Obstruction. A watercourse is a stream of water ordinarily flowing in a certain direction, through a defined channel with bed and banks. Its flow need not be continuous and its channel may sometimes be dry, but there must always be substantial indications of a stream which is ordinarily and most frequently a moving body of water; and a railway company will be liable if by its embankment it causes such a natural watercourse to be obstructed, to the injury of the owner of adjacent lands. Hill *v.* Cincinnati, etc., R. Co. (Ind.). 502.

What is not a watercourse. A channel made by mere surface-water and snow is not a watercourse, unless there is ordinarily and most frequently a moving body flowing through it. Such falling rain and melting snow constitute surface-water, which the owner of land upon which it accumulates may drain into a natural watercourse through his own land, or which he may by proper legal proceedings have carried through the adjoining land of others; but a railroad company is not answerable in damages for the obstruction of the flow of such surface-water. Hill *v.* Cincinnati, etc., R. Co. (Ind.). 502.

WORDS.

"Agents" includes engineers. St. Johnsbury, etc., R. Co. *v.* Hunt (Vt.). 284.

3 6105 063 240 076

